
AMERICA ON TRIAL:

THE THEORETICAL INJUSTICE OF AMERICAN GOVERNMENT

ORIGINALLY ENTITLED:

*"THE KANGAROO COURT: A NEW POLITICAL THEORY BASED
UPON THE INNOVATION OF THE HARMONIC CONSTITUTION."*

A NOVEL

By MICHAEL C. WILLIAMS

PHILOSOPHER AND DOCTOR OF LAWS



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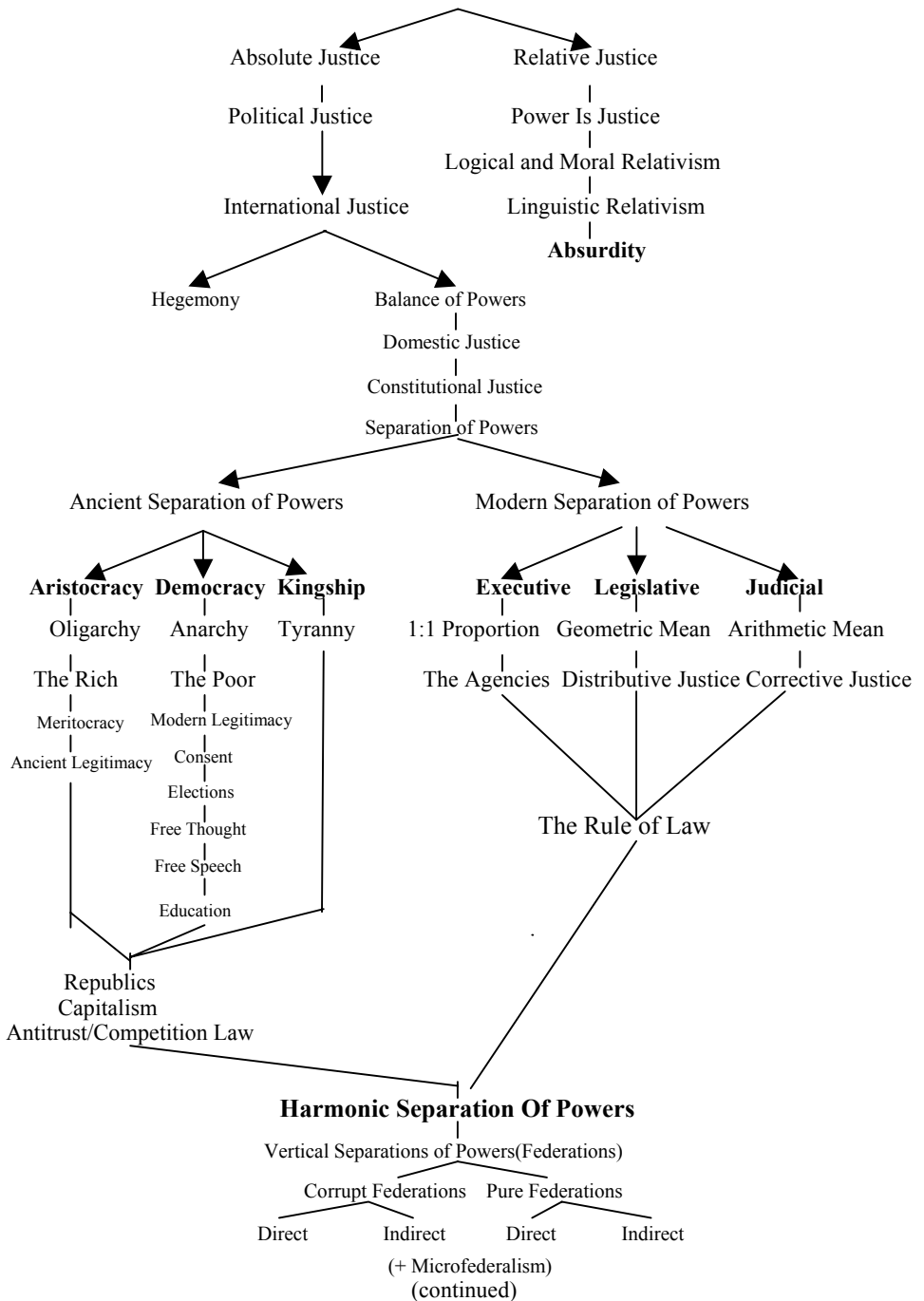
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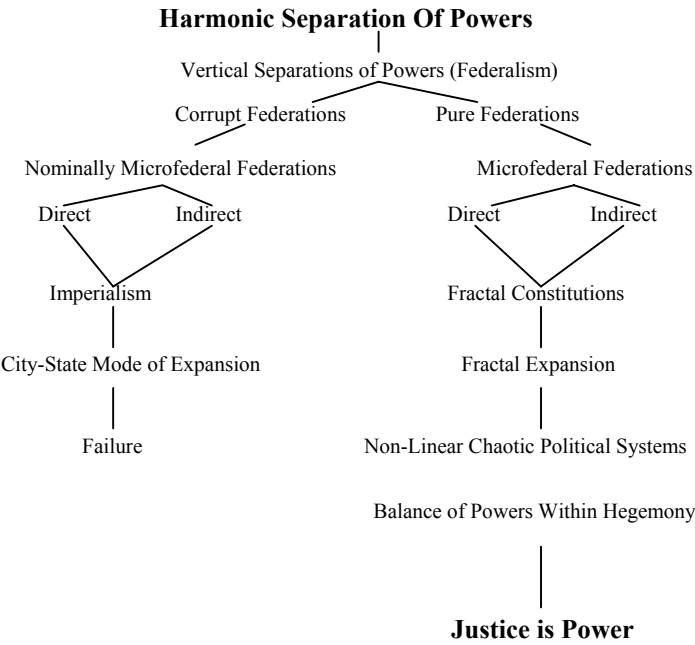
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CONCEPTUAL OUTLINE

Justice



(continued from above)



DEDICATION

This book is dedicated to that teacher among the trees who so long ago gave us the tools to know ourselves and our world. Plato, come with us to this new Law Court and let us see it together.

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PREFACE

The ancients said everything important. We are fated merely to footnote. They could not witness the explosions of science, medicine, economics or warfare, which characterize our age. As a result, we are bequeathed the honor of placing the new developments carefully upon the shelves which they built. Here, then, is another footnote to the ancients.

Michael C. Williams
Denver, Colorado

INTRODUCTION TO THE CASE:

America On Trial is a fictitious law case involving issues of political philosophy. It contains a search for the ideal system of justice. It is a work of philosophy, and you are a philosopher by virtue of your walking this path together with us, those who read and write philosophy. Do not fear the term philosophy. Hold your ridicule. It is just the study of the good, of what is a good life, a good country, a good court, and a good person. It requires logic and a certain pact with oneself. The pact is a promise to follow reason to its bitter end, to obey logic even when it leads to somewhere uncomfortable. It is a commitment to find the truth and heed it whatever its nature. I implore you to join in this pact and become a committed philosopher, at least while reading this case together with us. Be a philosopher and join us in our search for the good life, the good state, and the good court.

There are many who do not understand philosophy and consequently ignore it. They believe it is trivial, that philosophers stumble around arguing about trees falling in the woods, whether tables exist or not, whether we are free-willed or fated to do as we do. They say we are fool-osophers. But how foolish can it be to ask, as we all do, “What should I do with my life?” and, “How should we build our country and our courts?” These are questions of philosophy, although many will run from that conclusion and say that they are questions of political science, or law, or something else, but not philosophy. Yet, we will soon see from this case how politics, sociology, law, economics, and many other fields are all swallowed up by philosophy. They are all subsets of philosophy because they all relate to the good of something. This is only important because as subsets they cannot be adequately understood without seeing the whole into which they fit and with which they must be harmonized. Thus, to understand law one must understand politics, and to understand politics, one must understand justice, which requires understanding economics, human nature and morality, which in turn necessitates studying principles of right and wrong, good and bad, and other pure considerations.

In the truest sense, one must understand the whole in order to understand anything. This is the broad plain of human understanding which philosophy, and only philosophy, allows. It is knowing in the deepest and widest sense; it is understanding; it is wisdom. This is why the specialist, by definition, is one who cannot understand his subject, for true understanding requires a specialization in the whole, and this defines a generalist, not a specialist. Specialists do not study the broader contexts of their specialty. These topics they assume away. From the standpoint of technical accomplishment, specialization is very efficient, but for overall understanding and wisdom, it is useless. From the standpoint of wisdom, to be a specialist is to be a failure. Therefore, we must ‘specialize’ in the whole, as generalists, if we are to avoid the errors of our contemporaries. We must ever recall that politics, economics and law are all united under the broader subject of the good life, and this is an all-encompassing topic, one treatable only by philosophers or people willing to become philosophers.

This is an old case, both factually and stylistically. It is reminiscent of works composed two-hundred years ago, an age which epitomized the holistic and rational

approach described above; an age long gone but not forgotten. Some may find this style awkward, but it is a harmonious style, perfectly natural to the age in which the ideas of this case are themselves at home. It is to sidestep many of the errors of modern irrationality that we abandon modern era's lingo and its grammar and reach back to an age of greater rationalism and intellectual purity. Thus, it must be borne in mind that if something is archaic, it is so for a reason; a point is being made about how a concept fits into the history of ideas and human political evolution—perhaps *devolution*. Nothing in the book is accidental.

Intellectually, this case attempts to bridge some gaps long embarrassing to the history of the mind, namely the failure of political philosophers correctly to conceive and apply the idea of the separation of powers, and their failure adequately to bring economic and military considerations into theories of justice. Therefore, this case will deeply develop the subject of the separation of powers, the key element of an ideal justice system. Although mankind has made great strides in this field, the quintessential separation of powers has not yet been discovered. So far, we have only fragments of it from Plato, Montesquieu and others. We will derive its full essence by marrying the contending theories of ancient and modern political philosophy.

We will also explore the economic and military facets of justice. Economics *per se* is a new field of study, but it is actually an old subject and forms only a new way of looking at politics. As was the case with the separation of powers, we will blend the new economics with the older political theories. We shall supply the ancient's relative neglect of economics in politics and constitutional theory, and we will trace the impact of economic systems on military matters and observe how this impact affects the ideally just state. Thus, we will elucidate the political coefficient of economic laws and systems. We will especially clarify their constitutional impact, since all economic matters have unmistakable constitutional dimensions.

We will also take excursions through sociology, history, and other fields of knowledge as we derive the ideal system of justice. Every page may indeed seem to present yet another and more perplexing digression, but as truth is examined in detail, it begins to cost more words and takes our mind seemingly very far afield. When we plunge into this great question, the waves we cast will break upon far distant shores.

As Dworkin rightly noted at the outset of his investigation into law:

...a general theory of law will have many connections with other departments of philosophy. The normative theory will be embedded in a more general political and moral philosophy which may in turn depend upon philosophical theories about human nature or the objectivity of morality. The conceptual part will draw upon the philosophy of language and therefore upon logic and metaphysics...A general theory of law must therefore constantly...[advert to] problems of philosophy that are not distinctly legal.¹

We must not be surprised, then, to encounter in this case strange and unlikely topics. All of these reasonings will lead us towards the reality of justice.

This is not intended to be a popular work; its unpopularity will be the surest mark

¹ Dworkin, *Taking Rights Seriously*, Introduction.

of its merit. As Rousseau remarked, "There are in all ages men born to be in bondage to the opinions of the society in which they live...No author, who has a mind to outlive his own age, should write for such readers." It is irrelevant to truth what the mob wants to hear. Indeed, the desires of the masses usually indicate most reliably the direction away from truth and wisdom. In the words of Plato:

...the love of wisdom is impossible for the multitude...[The masses are as] a great beast...calling the things that please it good and the things that vex it bad...[And,] if a man associates with these and offers and exhibits to them his poetry or any other product of his craft or any political service, and grants the mob authority over himself more than is unavoidable, [he will be compelled] to give the public what it likes. But that [such] is *really* good and honorable, have you ever heard an attempted proof of this that is not simply *ridiculous*?²

For this reason, the work's unpopularity is its greatest recommendation. That is why, to return to the original invitation, you are implored to ignore the masses and join us as philosophers. Take the oath to follow reason wherever it leads, and explore with us the best system of justice.

We will now begin our fictitious court opinion. But as we do so beware, for the issues addressed in it are highly symbolic as well as literal, as are all the facts and names. Nothing is accidental. Every name and claim is in some way figurative. Every point in the case is made on both the level of straightforward prose and dramatic depiction. Nothing is accidental. Thus, if the reader finds something incongruent, it is so by design and the incongruity contains a lesson. So, dear readers, dear philosophers, come down to the new Law Courts and let us see them for ourselves.

² Plato, *Republic*, Book VI, 493 D. (Alpha-numerical references to Plato herein conform to the traditional numerology of H. Stephanus' edition, Vols. I-III, Paris, 1578.)

FACTS OF THE CASE

“IN RE: THE MATTER OF POLYNEICES”

JANUARY 1, 2000

The case before this court was a family affair, but it is now much more, having become a national matter and a lesson for all time. It is the case of two brothers who murdered each other. Each wanted to be President as their father had been. One gained the office, the other left in a rage, bent on taking by force what he thought was justly his. He returned with an army, attacked the state, and lost. In the fray, he and his brother slew one another. As a result, their uncle became President, glorified his predecessor, and damned the insurgent brother as a traitor, ordering that his body be left to rot where it fell. The brothers' sister, obeying the laws of natural decency, buried her traitorous brother anyhow, and her uncle had her condemned to death for it.

One can imagine such injustice coming from the mythical dramas of times gone past. But what shocks us is that this result occurred in the United States of America. Although few would expect such a result, she appealed her death sentence and lost under American law. She appealed again, and lost again under American law. She took her case to her supreme court and lost a third time.

She then turned to us, her final court of appeals, and begged us to review and reverse the injustice she had suffered. Her lawsuit was against her country and its legal system, a system which could make a law requiring that she leave her brother's corpse to rot, a system which could condemn her to death for doing what natural decency required, a system which could uphold her death sentence at every stage and turn, a system whose legal doctrines easily sanction such a result. We reviewed this case as requested by both her and her country, she as Petitioner, and the United States as Respondent. Below is the abbreviated text of our opinion and our final judgment regarding this 'Matter of Polyneices.'

* * *

In Re: The Matter of Polyneices Supreme Court of Jurisprudence

(JUDGMENT OF THE COURT, PER CURIAM.)

Petitioner herein invites this court to overturn her conviction for treason, alleging in support thereof that the United States is unjust, particularly in its arbitrary interpretation of its Federal constitution.

The facts which give rise to this case are uncontested. Petitioner's brother, decedent herein, also known as Polyneices, was killed by federal military personnel acting in defense of the United States. The illegal burial of his body earned his sister a conviction for treason.

It is a matter of record that the decedent Polyneices attacked the United States in anger over the political composition of the government. It was his belief that the office of President of the United States was his by constitutional right. His brother, Eteocles, a citizen of the United States, disagreed and lead a popular movement which ultimately resulted in Eteocles' elevation to the Presidency and the exile of decedent Polyneices. This court was not called upon nor will it now rule on this Presidential succession. Abroad, Polyneices formed a militia and returned to gain the Presidency by insurrection. A United States force was sent to dispute the issue, lead by Eteocles personally. The American force prevailed in the combat, but both brothers were slain.

Subsequently, a rule was promulgated by the Defense Department, an agency of the United States Federal Government, making decedent Polyneices' burial an act of treason so long as witnessed by at least one person. The rule also mandated the death penalty. The purpose of this rule was apparently to damnify and disgrace Polyneices in the eyes of the American people, thereby to deter future resistance to the government. This rule forms the central issue in this case.

Eteocles was given a formal state funeral and burial at Arlington National Cemetery, while decedent's corpse was left exposed to the elements in a grisly display of public putrefaction. Petitioner, in violation of the Agency's no-burial rule, interred her brother's corpse, was arrested, and finally convicted of treason in a Defense Department adjudication. The agency convicted her on the testimony of one witness, a law enforcement officer who observed her bury her brother.

Petitioner appealed her conviction. The decision was upheld, however, by the United States Defense Department's Agency Review Board. The board declared that the rule was a properly promulgated interpretative rule, exempt from the Administrative Procedures Act under §553(a)(1) and consistent with the agency's governing legislation. The Agency Review Board also held that the death penalty portion of the rule was an acceptable sanction under §558(b), noting that "the relation of remedy to policy is peculiarly a matter for administrative competence." Citing and quoting from *American Power Co. v. SEC*, 329 U.S. 90, 112 67 S.Ct. 133, 146 (1946).

Petitioner again appealed, this time to the United States Ninth Circuit Court of Appeals, which sustained the judgment on the theory that the Congressional agency legislation was a lawful exercises of Congress' power to regulate interstate commerce under Article I, Section 8 of the United States constitution, citing *Wickard v. Filburn*,

317 U.S. 111, 63 S.Ct. 82 (1942), and that the treason rule was made pursuant to a valid delegation of legislative power, citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

Petitioner at length appealed to the United States Supreme Court, which agreed to hear the case and upheld both her conviction and death sentence, holding that the agency's treason rule was consistent with the constitutional requirement of two witnesses for convictions of treason, since one person was within the constitutional meaning of two persons.³ The court defended its position by reminding that:

It is no answer...to insist that what [the Constitution] meant to the vision of that day it must mean to...our time...The great clauses of the Constitution [need not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them..." Citing and quoting from *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 54 S.Ct. 231 (1934). (Justice Hughes writing for the majority).

In further support of its permissive interpretation, the court reminded, "We must not forget, it is a *constitution* we are interpreting," citing and quoting from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819).

Out of desperation, Petitioner appealed to us, and we granted final certiorari. Petitioner asks this court to set aside the United States Supreme Court's holding on the following grounds:

- 1) That the constitutionality of the Agency's treason rule was based on an impossible interpretation of the Constitution's treason requirements;
- 2) That the Agency's governing statute violates the separation of powers;
- 3) That the Agency's governing statute is an unconstitutional delegation of legislative power;
- 4) That the judgments of the Agency and appellate courts were arbitrary and capricious;
- 5) That the Agency rule violates the principle of consent of the governed;
- 6) That it was a bill of attainder and hence unconstitutional;
- 7) That such judicial behavior amounted to legislation, not judicial review; and
- 8) That such process, taken as a whole,
 - a) creates an unjust system of government,
 - b) results in an indeterminate constitution,
 - c) constitutes a virtual adoption of the principle that there is no justice *per se*, but merely legality, or whatever the regime dictates,
 - d) establishes a nation ruled by men and not laws, and
 - e) amounts to a retreat from an ideal system of justice.

We shall address these claims beginning with number eight and its sub-parts, in order to decide the merit of Petitioner's appeal.

³ Two Justices Dissenting.

PART I: JUSTICE IN THEORY

SECTION I: THE ABSOLUTE NATURE OF JUSTICE

THAT DISCUSSION OF ANY JUSTICE SYSTEM REQUIRES A PRELIMINARY UNDERSTANDING OF WHAT JUSTICE MEANS.

Petitioner's brother is dead, and Petitioner now stands in the gallows' shadow for burying him. She claims that Respondent's method of putting her in this predicament was unjust. In order for us to address this alleged injustice, however, it is first necessary to clarify what justice is; for if there is no such thing as justice, or if justice is a relative term, then Petitioner's claims are meaningless and she must lose this appeal. If this is the case, we will dismiss this appeal and allow the United States to proceed with her execution. On the other hand, if we find that there is indeed such a thing as justice, only then will we reach the specific questions as to whether particular acts of the Respondent and the structures of its government through which it acted are unjust.

The Federal Government of the United States of America, Respondent herein, first seeks to defend its conduct towards Petitioner by moving to dismiss her last claim, essentially that its government is unjust, on the grounds that it is a non-justiciable political question, or in the alternative, that it fails to state a legitimate cause of action. We refuse this request, however. Injustice is the essential basis of all legal claims. For the Respondent to suggest that justice is non-justiciable or illegitimate, or that a claim of injustice is beyond our judicial competence, supplies us with a strong temptation to hold them in contempt. Fairness to both parties, however, and fidelity to our essential function as a court require that we refrain from such censure and instead announce the logical reasons underpinning our conclusions 1) that injustice is a valid claim; and 2) that Respondent must fully refute this claim on all the merits in order to prevail.

THAT JUSTICE IS THE PRINCIPLE OF GOODNESS IN THE ORDERINGS OF HUMAN AFFAIRS.

Respondent insists it cannot be charged with injustice since justice has no exact definition. We cannot charge the Respondent with a vague or uncertain claim, it is true. If justice is unintelligible, indeed we must uphold the decisions of the American courts and let the Respondent carry on with the Petitioner's execution. We do not believe, however, that the term 'justice' is so vague as Respondent suggests, and confusion surrounding the term cannot operate to quash the charges against Respondent. We are more than prepared to dispel any confusion by taking notice, as a threshold matter, of what justice is.

Justice names an idea, a concept, not a physical thing. When we say that a thing is just or the reverse, however, we mean that a physical thing partakes of the concept of justice. Such physical instances of justice may be called earthly or applied justice, to distinguish them from the idea of justice *per se*. We shall need to analyze both. But as for applied justice, it is clear that it signifies on the one hand the should and on the other the right. Both usages converge upon the same meaning, however, namely the good, since should refers to what would be good, and right refers to what actually is good. Thus, applied justice is a permutation of goodness itself, applied to either the past, present, or the future. Moreover, justice refers to the ordering of material things, for it is in such orderings that relationships arise which can be deemed just, unjust, or neither. Taken together, then, applied justice refers to the temporal good in the relations among material things.

Still, we hold that justice cannot refer to all such goodness. For instance, nobody would call a good meal a just meal, although a good meal has a goodness in the relations of its material things; therefore justice must refer only to some set of material things, and not all of them, lest every temporal good be as well just, such as just cooking or a just joke. Justice refers to the orderings of sentient beings, like humans, since where there is no conscious subject there can be no characterization of justice. Were there no conscious subjects, could the mere orderings of rocks and clouds be just or unjust? Perhaps in poetry. But it is only as they relate to sentient beings that such materials take on real characteristics of justice. This is not to say that the orderings of non-sentient matter become just or unjust unto themselves upon the introduction of human subjects, but rather, the relations among all matter, the sentient beings included, become just or unjust in relation to these sentient beings. Thus, justice is the good related to the orderings of human beings, with respect to each other and the material world. Justice is thus the principle of goodness in the orderings of human affairs. It is this definition we shall apply in examining Respondent's actions. We do not mean to imply that humans are the only sentient beings or that there is no justice beyond theirs. But since they are the only ones presently before the court, we will so limit our discussion.

THAT SCIENTIFIC EPISTEMOLOGY AND MORAL RELATIVISM MAKE THIS DEFINITION OF JUSTICE DIFFICULT FOR MODERNS TO ACCEPT.

Respondent counters that our definition of justice is inapplicable because there is no absolute or universal meaning of relative terms like just and good.

Our definition of justice may not be easy for some to admit. The *good*? Justice is a principle of *goodness*? Justice is of the *good*? Even in the universities and law schools, few are willing to consider the possibility that there is any absolute principle of justice or goodness. The present age is one of moral relativism. It believes in no universal truth, no absolute good or bad, no absolute right or wrong. Moral questions are despised, considered futile exercises in prejudice and bigotry, and the assaults upon moral reasoning grow ruder and more violent with each passing year. There can be no true good, say the "scholars" of this age, the modern *pre-socratics*, since the good is whatever each person believes it to be. Under such a regime of relativism, it follows that there can be no justice either, since it is but a species of the good. Justice

is relative, they say, consisting in whatever anyone believes. It could then be anything, which is to say, it is nothing. If this were true, then the Respondent herein would be correct; there would be no such thing as justice, and it would be incumbent upon us to dismiss Petitioner's claims regarding the injustice of her predicament and that of Respondent's system of government. If there were no such thing as justice, the Respondent would immediately win this case, for they could not possibly have acted unjustly.

Petitioner's allegations as well as Respondent's proffered defense require us actually to identify the ideal system of justice, which is impossible if there is no such thing as justice, or similarly, if justice is whatever anyone likes. The search would be quick indeed if one were able to opine that justice was a purple sheet and be right by virtue of the fact that it is a purple sheet *for him*. Indeed, nobody would need to read this opinion since their own opinion, whatever its content, would already be true for them, automatically. Therefore, we do not imagine it any idle pursuit here to investigate first whether or not there is such a thing as justice, for if there is no justice, we are wasting our time examining ideal systems of justice. And, before chasing down the answer to that question, namely whether there is any such thing as absolute justice, we must first establish whether there is any absolute good, for the absolutely just is merely an instance of the absolutely good, as we said before, when we noted that justice was the good related to the orderings of humanity. So let us not shrink from this threshold question, for if there is no absolute good, there can be no absolute justice, and hence no ideal system of justice.

THAT THERE CAN BE NO ABSOLUTE JUSTICE, AND HENCE NO IDEAL SYSTEM OF JUSTICE, IF THERE IS NO ABSOLUTE GOOD, AS UNDER RELATIVISM AND EMPIRICISM.

Respondent claims that absolute good cannot exist because nothing exists absolutely. We will therefore begin by examining whether anything at all has any absolute nature, since if this is not the case, it obviously follows that justice cannot be absolute.⁴ Does anything exist absolutely? This question asks whether anything really "is." Few would argue but that a thing must either be, or not be; that it must be or not be a certain thing or a certain way, and by this we mean that there is no alternative to these two possibilities, a thing exists or it does not. And some will still argue with this, asserting that some things are thus and such for some people but not for others. Therefore, in order to answer this contention, it is necessary, surprisingly, to prove that that which is, really is, and that which is not, really is not. Although we blush to put such things on paper, this is a serious debate, upon which the entire possibility of justice rests.

⁴ We footnote this in order to remind that the text itself is but a footnote of Plato and Aristotle, whose timeless analyses of these issues guide us even in spite of modern antipathy for them. We shall direct the curious to the original ancient arguments wherever possible.

THAT THINGS EXIST ABSOLUTELY, FOR IT IS IMPOSSIBLE TO KNOW SOMETHING WHICH HAS NO FIXED EXISTENCE.

Respondent argues that although we may posit things to exist absolutely, we cannot prove it. On the contrary, however, there are two proofs of the contention that things exist absolutely, that is to say, that they have absolute natures and are not relative matters of opinion. The first is shortest and rests upon the fact that it is impossible to know something which has no fixed existence, for how can we name something which constantly evades us by being in flux?⁵ The fact that we can utter a word and be confident that it calls forth the idea of some “thing” means that such thing is in some respect fixed and capable of being articulated by the word. Thus, it is clear that knowability requires determinacy, and that which has no absolute nature is in constant change and thus unknowable, even unthinkable and unmentionable. Therefore, the fact that we indeed do know things, speak of things, and communicate intelligibly with others about things, proves that a fixed, determinate reality exists, about which we are uttering meaningful words. Thus, certainty and the absolute nature of reality is proven by the phenomenon of knowledge itself.

THAT THE UNCERTAINTY PRINCIPLE PROVES, RATHER THAN REFUTES, THIS IMPOSSIBILITY OF KNOWING INDETERMINATE THINGS.

Respondent claims that modern science proves that all things are inherently uncertain, including our definition of justice; and the charges against Respondent must therefore be dismissed. We know some *physicists* will quibble that the uncertain is yet knowable, or on the contrary, that some things about which we are certain are nevertheless unknowable. They will adduce the so-called uncertainty principle of quantum mechanics to prove it. We have explained our dislike of the *physicists* elsewhere⁶ and will not dwell on it here, but we will refute their contention before moving on, and this for two reasons, first, to make it clear that the indeterminate is absolutely unknowable, as we said above, and second, to show how *physicists* tend to hide behind theories which obscure simple truths, in which even they believe, although they often do not realize it. Let us look carefully at this well-respected contention of modern thinkers, that uncertainty is knowable, since it emanates from the allegedly best and most respected thinkers of our age.

The uncertainty principle arises from the current theory of atomic structure, advanced primarily by Heisenberg, Born, Schrödinger, Bohr, and Dirac, based on the tendency of particles to show wavelike properties, as described by de Broglie’s theorem that an electron has a wavelength equal to Planck’s constant.⁷ De Broglie’s theorem merely stated that fixed wavelike behavior was inherent in all matter, and it defined that relationship which obtained between particles and their specific waves. Electrons could thus be understood as orbiting a nucleus not in perfect circular mo-

⁵ Plato, *Theaetetus*, 182 D.

⁶ The *Sophomoric Discourses*, Book II, Chapter I.

⁷ $\lambda = h/mv$. See generally, *Project Physics*, Section 20.3.

tion, but in fixed wave orbits. Upon this idea was built the study of wave mechanics as the wave relationship was investigated further. Schrödinger observed that unlike circular orbits, only certain wave orbits would fit around a nucleus, thus accounting for the probability of electrons to change from one energy state to another, as they leap among the potential wave orbits. So far, nobody has said that unknowables are knowable. The unknowability arises from the following consideration. In trying to locate the velocity and position of the electron in its wave orbit, it is necessary to physically touch it with something, something like a very short wavelength, with high velocity, frequency, and momentum. Only such a thing is the right size and speed to successfully catch and touch an electron, and return to tell about it. Unfortunately, in doing so, it knocks the electron hard, like a billiard ball, changing its velocity and direction, making its current whereabouts uncertain, thus the uncertainty principle.⁸ We can never measure both the position and velocity of an electron to unlimited accuracy. But this means that the change makes the thing unknowable, which, far from refuting us, rather proves what we have said, namely that knowledge requires determinacy and is thwarted by flux. With this objection refuted, let us now accept the fact that indeterminacy is unknowable, as we have understood for more than two thousand years, and look at another proof, yet more powerful than this, of the fact that existences must be absolute and therefore cannot be relative or relativistic.

THAT THE EXCLUSIVITY OF OPPOSITES FURTHER PROVES ABSOLUTE EXISTENCE AND REFUTES RELATIVISM.

The existence of opposites supplies an even better refutation of Respondent's claim that things do not exist absolutely. The existence of opposites proves that relativism, or the contention that all matters are relative, is impossible. This may sound cryptic and even counterintuitive, but consider the following: Most agree that some things are referred to as hot, and some cold. And most believe that when they say hot, they mean precisely not cold, and when they say cold, they mean simply not hot. Thus, to say hot means, to that extent a lack of coldness, and that a retreat of hot entails an advance of cold, such that every temperature is a ratio of the one to the other, the less hot being therefore more cold.

Likewise, some things are referred to as up, and some down. And most believe that when they say up, they mean precisely not down, and when they say down, they mean simply not up. Thus, to say up means, to that extent a lack of down-ness, and that a decrease of up entails an increase of down, such that every height is a ratio of the one to the other, the less up being therefore rather more down.

Similarly, some things are referred to as wet, and some dry. And most believe that when they say wet, they mean precisely not dry, and when they say dry, they mean simply not wet. Thus, to say wet means, to that extent a lack of dryness, and that a retreat of wet entails an advance of dry, such that every degree of either is a ratio of the one to the other, the less wet being therefore rather more dry. The same can be said for the "different and same," the "backward and forward," the "more and

⁸ Expressed thusly: $\Delta x \Delta p \geq h/2\pi$, where Δx is the uncertainty of position, Δp is the uncertainty of momentum, and h is Planck's constant, which is 6.6×10^{-34} J-Sec. *Project Physics*, Section 20.5. and 18.5 for Planck.

less,” and all other opposites as well. Thus, opposite words mean the non-existence of their opposite, and the assertion of the one is a denial of its opposite. This turns out to have a profound investigative utility regarding the nature of reality, although it may seem irrelevant at first glance.

Respondent complains that we are off the subject, far from our original analysis of the ideal system of justice and the claims of Petitioner. Nothing could be less true. If opposites cannot ever be each other, what results from two persons each holding an opposite belief about a thing? If one person says the thing is hot and the other believes it to be cold, we know that it cannot be both hot and cold, at the same time and in the same respect, for the existence of one entails the non-existence of the other. Thus, the opinions we hold cannot be the determinant of the truth of the thing, because opinions may be in opposition to each other, and could thus *make* a thing both one way and the opposite way, which is impossible. So what have we proved? We have shown that our opinions cannot be the true essence of things, that things have their own nature regardless of what we think, despite our opinions about them.⁹ Our opinion that the sky is red does not make it so; it will be whatever it is despite our assertion. Our opinion that a cup is hot does not mean that it is truly hot, but rather that such is our opinion. This does not mean that our opinion is ‘true for us,’ but rather that for us it is an opinion. The reason it is not ‘truth’ for me is that the temperature of the cup does not change according to our belief. For instance, a box contains whatever it contains despite our opinion of what is inside of it. There may be a cat inside, but whatever the case, our opinion that there is a dog inside makes no difference. An opinion cannot operate to transform the cat into the dog. Merely saying a cat is a dog and affixing the words ‘to me’ does not convert cats into dogs in the real world. The phrase ‘true to me’ merely names the owner of the opinion about truth, and says nothing about the real truth of a thing or of the world at large. Opinions are not truth and cannot be the reality of any matter. The expression ‘true for me’ means merely true in my opinion, which is not truth, but still merely opinion.¹⁰

This strict use of the term truth is crucial to all reason and understanding, for without it, truth is anything and therefore nothing. It becomes whatever anybody says it is, a proposition known as relativism. This theory was epitomized by the pre-Socratic Greek sophist Protagoras, who was famous for claiming that ‘man is the measure of all things.’¹¹ This summarizes the idea of relativism which we have been heretofore assailing, the idea that truth is merely my opinion, that my opinion is true for me, that I am the measure of all things.¹² In response, Plato was at pains to show how such a theory was impossible, self-contradictory, and preclusive of all knowledge and discourse.¹³

⁹ Plato, *Theaetetus*, from 184 B and *a fortiori*, from 187 B.

¹⁰ Plato, *Cratylus*, 386 D-E.

¹¹ Protagoras of Abdera, ostensibly from his works ‘*On Truth*’, ‘*On the Gods*’, or ‘*Antilogic*’, none of which survive, even in fragment. For summary, see Plato, *Theaetetus*, at 178 B; for conclusory treatment: Plato’s *Cratylus*, at 386 C.

¹² This is, perhaps, an overstatement of Protagoras’ position; it echoes Sextus Empiricus’ view that the rival qualities perceived by people are actually present in things. This is for clarity, since both permutations lead to the same contradiction but the extreme offers the readiest vantage point.

¹³ Plato, *Theaetetus*, 178 B—179 D.

This is why relativism is impossible and the things in the world have a fixed nature. If relativism were possible, then things would really become what we opine them to be, and they could theoretically be their own opposites. Since things cannot be their own opposites, at the same time and in the same respect, the opinions we have about them must be mere opinions, and not truth. If this were not so, no opinion could be wrong, however absurd. No teacher would have a reason to teach, no student would have anything to learn. Statements such as ‘three is two’ could not—even possibly—be wrong. ‘One is one’ could not even possibly be right. No answer could be right about anything. Petitioner and Respondent herein would each be wrong and right at the same time, an absurd turn of events, and this court itself could not hold one the winner and the other the loser. All thought and all discourse disintegrates if truth is relative, if man is the measure of all things. Readers who believe in relativism should stop reading this; they should stop studying anything.

We must never make the mistake of thinking that an opinion is truth, for such would destroy the possibility of all knowledge, all wisdom, and all principles of justice. We have mentioned this in order to establish the fixed, absolute nature of things in general, with an eye to determining whether the good, and its child, the just, are such fixed, absolute things, in order to finally determine if there is an ideal system of justice and whether the Respondent has failed to operate in accordance with such an ideal system of justice.

THAT EVEN MAJORITY OPINION IS NEVERTHELESS NOT TRUTH.

Respondent argues that even if an individual’s opinion is not truth, when many individuals are brought together and compose a multitude, the opinion of the majority actually is truth, a fact which not only attests to the ultimate glory of individuals but also supports the precious ideals of majority rule. We disagree.

Popularity does not create truth. No multiplication of error among the multitude, however extensive, can convert an error into truth, although it is certainly more comfortable to live with the erroneous opinion when it becomes popular. But this is pleasure, not truth. When an idea becomes popular, it becomes pleasurable but gains nothing in truth or falsity. There is only one element which makes a majority opinion a true opinion, and that is an exact accordance between the opinion and the reality about which it speaks, and this can be correct in the case of any true opinion, however popular or obscure.

Socrates was once asked to take sides in a debate in order to allow a majority opinion to arise between two others. He said:

What[?]. . .are you going to join the side which gets the approval of the majority of us? . . .Suppose you had a consultation as to what your son’s exercise should be for a coming contest, would you be guided by the majority of us, or by the one who happened to have trained and exercised under a good master? . . .Would you be guided by him alone rather

than the four of us?...Yes, for a question must be decided by knowledge, and not by numbers, if it is to have a right decision.¹⁴

Thus, popularity is irrelevant to truth. Still, Respondent protests that the widespread acceptance of an opinion is, at the very least, evidence of truth, and in this regard the opinion of the majority tends to be truer than the opinion of the individual. We also disagree with this, since majority opinion more often indicates falsity than truth. The larger the majority who hold an opinion, the less specialized in the subject at hand will they be, and the result is that as the majority grows, its ability to discern truth shrinks until it is eventually a mindless mob. A great multitude cannot but generalize on any particular topic, and therefore its opinions are presumptively wrong as compared with the specialist. It is for this reason that a mob essentially believes what it is told, and it is for this reason that, as Germany recently proved, an entire people will believe a big lie far more readily than will an individual.

THAT TRUE OPINION IS NEVERTHELESS STILL POSSIBLE.

Respondent objects that we have just proven that all opinions are false, since no opinion is truth, even a majority opinion, and under such a theory our opinion of justice must likewise be false, and we must discharge the case against them, as it would be entirely based on falsity. Despite Respondent's claim that we have rendered all opinions false, true opinion is still possible. Clearly, if we think a cat is in the box, and it turns out to be so, then this opinion is true. But this is merely saying that there are opinions which correspond to the truth, i.e. true opinions. It does not mean that the opinions created the truth or govern it. If we opine that the sun rises, and it does so, then such was a true opinion; still, the sun did not rise in obedience to our opinion, but merely in coincidence with it. Certainly, if we opine that it will not rise, that in itself will not prevent the phenomenon. This is all a fancy way of proving that opinions, while not causative of truth, may still be reflective of it. This also fortifies our conclusion that things exist absolutely.

THAT SHIFTING THE DISCUSSION AWAY FROM PHYSICAL THINGS TO IDEAS CANNOT REVIVE RELATIVISM, FOR IDEAS HAVE FIXED NATURES.

Respondent complains that this may be correct for physical things, but that ideas themselves are not governed by this straightjacket of logic. They argue that one idea of the high will be different than another idea of the high, and thus highness itself is relative, and not fixed, and that we are wasting time talking about the height of physical things when highness itself is relative and indeterminate. Let us investigate this. Can the idea of highness, or any other quality, admit of its opposite? Or can high admit of anything other than highness? Must it, in other words, be highness and only highness, or may the idea of highness include also bigness, or redness, or wetness? If

¹⁴ Plato, *Laches*, from 184 E.

highness has any meaning at all, it is a lack of lowness, the idea of highness merely meaning the notion of no lowness. Thus, as for the exclusivity of opposites, shifting the discussion away from physical things and to ideas cannot render ideas relative, for in the ideal sense, they are even more pure than when mixed up in the description of physical objects, such as when the red and the circular are said of a red ball. But as to the purity of the idea of highness, why could it not also include redness? Because to the extent that highness is high, it is not other than high, and if it is red because it is high, such merely means that redness, in fact, is highness.

This principle, that ideas have fixed natures and cannot include alternate ideas, follows from a consideration of what sameness and otherness are. This pair of opposites can be tricky.¹⁵ But without getting needlessly complex, let us consider what it means for something to be either same or different. Since these are opposites, it is clear that sameness is a denial of difference, and that things which are similar are not different in the same way and respect that they are similar. There are other ways of saying this, since 'same' means as well 'equal,' and therefore the 'different' means the 'unequal;' the 'different' also means the 'other.' Moreover, sameness means that which is whole and has no parts, for parts bespeak differences, and thus, that which is same must be whole. This is no different from saying that the same is one, for oneness means lack of multiplicity, manyness, or difference. Let us see where this gets us.

This all becomes critical when we recall that two things which are the same share a common opposite. Hence the identical relationship obtains between equal and unequal as between equal and different. Note that sameness cannot be a difference, and thus an idea cannot be other than what it is, and things which are other than the idea cannot be a part of it. This proves that among ideas, each is distinct and cannot be confuted with others. Certainly our opinions of ideas may differ, but as we said before, such does not mean that the ideas themselves are capable of being different from themselves, or that there may be two rival ideas of high. The idea of highness cannot be different from itself and thus exists alone and without a rival notion of the high. Why did we go through this? We reviewed it in order to refute Respondent's claim that there was no absolute measure of highness since there exist rival ideas of the high, namely high for me and high for you. Plainly, there cannot be such rival ideas, although there can be rival *opinions* about the nature of the idea of highness, irrelevant as these are to the true essence of the high. Such will be the case with all other opposites, including good and bad. Most importantly for the Petitioner's claims, such will be the case regarding just and unjust.

THAT WORDS ARE NOT RELATIVE, BUT FIXED AND DETERMINATE; THUS LOGICAL STATEMENTS ARE NOT MERELY A RELATIVIST GAME OF SEMANTICS.

Respondent cries out that this is all so much semantic trickery, some kind of verbal swindle. Respondent claims that we have ensnared them in mere word-games. This criticism is always the last outpost of relativism, that logic itself may be ignored since it is delivered by means of words, which have no fixed meaning, and thus even

¹⁵ For a clarification and an anguishing paradox, see generally, Plato's *Parmenides*, from 146 D.

plainly true statements are merely groups of words which bear no relationship to the things of which they speak. This is a very popular criticism, popular because it is such an easy way to avoid accepting logical conclusions which are disliked or unpopular. For although a philosopher is trained to follow logic to its conclusions whether he likes them or not, even when the logical result of his inquiry disappoints his expectations and throws him into misery, the masses of humanity have no such inclination and never fail to reject logic and reason when it contradicts their opinions. The fastest way to assault logic and destroy all truth is to claim that logic is just words, and words are relative, meaning different things to different people.

This theory of verbal relativism is the semantic counterpart of Protagoras' theorem of relative truth, which resulted in logical self-destruction, as we have seen. It was made famous around the Fifth century B.C. by the presocratic philosopher Heraclitus, and made famously ridiculous by Heraclitus' critics ever after, among whom were Plato and Aristotle.¹⁶ Heraclitus wrote in obscure, cryptic language, often falling into intentional contradiction and paradox. His name has symbolized arcane and oracular imprecision ever since, although his underlying theories do not easily admit of such relativism.¹⁷ It is the style of Heraclitus that was classically equated with the notion of verbal indeterminacy and the inherent meaninglessness of language. Despite the ravages of age and famous philosophic excoriation, the idea of verbal relativism has survived every insult, seeming to thrive ever more gloriously with the supervention of the scientific worldview. It has taken root in modern society and has found its way into the American legal system.

Surprisingly, even esteemed judges and jurists have relied upon this illogical idea, namely that logic is made of words which are innately indeterminate. The American judge Traynor alleged this incredible fallacy while arguing that virtually no words in written contracts have a plain meaning, and that as a consequence, courts may consider extrinsic verbal, or 'parol' evidence to aid in the interpretation of any contract, even a facially unambiguous, complete, exclusive and fully-integrated agreement.¹⁸ He summarized by alleging that "words...do not have absolute and constant referents," and that belief in linguistic certainty is merely a "remnant of a primitive faith in the inherent potency and inherent meaning of words"¹⁹ Corbin repeated the mistake in his article, *The Interpretation of Words & the Parol Evidence Rule*, where he stated, "A word has no meaning apart from these factors [like context,

¹⁶ See Aristotle, *Rhetoric*, at 1407b11. (Page references to Aristotle conform to the Emmanuel Bekker edition, Berlin, 1831, wherever possible.)

¹⁷ Heraclitus of Ephesus is thought to have written one book, no longer extant and of unknown title. His work and reputation are known through the many fragments cited by other writers. His obtuse and idiosyncratic style is not a matter of debate, but his theory of the harmony of opposites has often been cast alternatively as an endorsement and condemnation of relativism. See Guthrie, *A History of Greek Philosophy*, Vol. 1, Chapter VII, Subsections V and X, part a.

¹⁸ *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* 69 Cal. 2d 33, 69 Cal. Rptr. 561, 442 P.2d 641 (1968). (arguing that the indeterminacy of words renders parol or extrinsic evidence admissible even for fully integrated contracts in spite of the plain meaning rule, as announced in UCC 2-202(b)).

¹⁹ *Id.* (Criticizing the plain meaning rule, UCC 2-202(b)).

circumstances, and the education and experience of users]; much less does it have an objective meaning, one true meaning.”²⁰

This conclusion results in a wreckage of justice. To avoid this accident, we will prove that logic is an imperative, that we cannot escape its conclusions, and that the words which are used to form logical statements are not relative, but fixed and determinate. Otherwise, logical discussions, reasoning, and the attainment of truth are all impossible. Plato drew this conclusion regarding linguistic relativism by noting that discussions with linguistic relativists are no better than chats with lunatics, who:

...pull out puzzling little phrases, like arrows from a quiver, and shoot them off; and if you try to get hold of an explanation of what he has said, you will be struck with another phrase of novel and distorted wording, and you never make any progress whatsoever with any of them, nor do they themselves with one another, for that matter, but they take very good care to allow nothing to be settled either in argument or in their own minds.²¹

Plato’s point has a profound importance for legislation and adjudicative deliberation. Accordingly, we must be aware of the danger he identifies before exploring the ideal system of justice. It is imperative to notice that if Traynor and Corbin are right, then neither written laws nor case decisions can be meaningful. This point was emphasized by Justice Kozinski in an opinion critical of Traynor’s thesis, where he states that Traynor’s suggestion of indeterminate linguistics:

...chips away at the foundation of our legal system. By giving credence to the idea that words are inadequate to express concepts, [Traynor] undermines the basic principle that language provides a meaningful constraint on public and private conduct. If we are unwilling to say that parties dealing face to face can come up with language that binds them, how can we send anyone to jail for violating statutes consisting of mere words lacking, [as Traynor contends,] ‘absolute and constant referents’? How can courts ever enforce decrees, not written in language understandable to all, but encoded in a dialect reflecting [what Corbin asserts as] only the ‘linguistic background of the judge’? Can lower courts ever be faulted for failing to carry out the mandate of higher courts when ‘perfect verbal expression’ is impossible? Are all attempts to develop the law in a reasoned and principled fashion doomed to failure as ‘remnants of a primitive faith in the inherent potency and inherent meaning of words’?

This is precisely the legal consequence of asserting the indeterminate meaning of words and the relativity of language—a destruction of the justice system and justice along with it. Without fixed meanings, it is inevitable that words, sentences, paragraphs, opinions, statutes, and even constitutions all become indeterminate and therefore essentially meaningless.

²⁰ Corbin, *The Interpretation of Words & the Parol Evidence Rule*, 50 Cornell L.Q. 151,187 (1965).

²¹ Plato, *Theaetetus*, 179 E.

Therefore, if we want to insure that our present discussion of justice indeed leads somewhere intelligible, we must first examine language and see how it is logically absolute and not relative, lest our words merely dribble out in meaningless indeterminacy, like a relativist, like one of Plato's lunatics, like Heraclitus, like a Traynor.

THAT LANGUAGE IS ABSOLUTE, AND THAT THE IDEAS BEHIND WORDS ARE NOT RELATIVE.

Respondent vehemently asserts that language is relative, for everywhere on earth we see different words used for the same thing, with no agreement as to which word is right or wrong, and so many words to which multiple and contradictory meanings are assigned, such that everything can be said a thousand different ways, and every thing said has a thousand different meanings.

Even a million permutations of expression, however, does not prove language to be relative or indeterminate. The fixed nature of language can be proved, and quickly, by the following considerations. There are ways of weaving which are correct, that is, ways which interpose threads among each other such that they stay together. Conversely, there are ways of weaving that are incorrect, which place threads together in such a manner that they nevertheless soon fall away from each other. Likewise, there are ways of cutting which are correct, namely those which cleave and separate, as there are ways of cutting which are incorrect, those which do not cleave. And furthermore, there are ways of cutting which, being correct, are more so than others, producing the result better than others, such as cutting away a turkey wing by carving at the joints rather than through the bone.

Likewise, there are correct and incorrect ways of doing any activity, such that the end is either achieved or missed. Naming is an activity, and thus there are correct ways of naming, those which correctly bring to mind the thing named, which reproduce its essence accurately. This has been said before.²²

To name correctly, one must use words to carve *reality* at the joints, as Plato said.²³ In order to use language to carve at the joints, it is necessary to look at the nature of language and understand how words relate to the things about which they speak. Again, many might think this an idle exercise, but it is critical if we are to speak dependably about actual instances of justice and law which are not words, but instead subjects of words. It is necessary to be able to distinguish between words and ideas, which cannot be done without an understanding of words themselves. It is also necessary for us to look into the linguistic form of the sentences we wish to investigate, as we will be looking for justice not only as a word, but as a compositional predicate in a proposition. For example, we will be saying that, "justice is thus and such," and "this is just but not that." Let us look at how languages work, therefore, that we will not mis-phrase the propositions as so many do when they conclude that, since there is no truth to statements such as "Please grant me strength," there is accordingly no truth to any other statements.

Languages are part of our attempts to map out in our minds the reality around us, of which we are a part. Aristotle tells us that, "all persons have not the same speech

²² Plato, *Cratylus*, from 387 A.

²³ Plato, *Cratylus*, 388 C, particularly in light of 387 A.

sounds, but the mental experiences, which these directly symbolize, are the same for all.”²⁴ The words we use each refer to some aspect of reality. Thus language is intrinsically symbolic. Moreover, there are two basic categories of words, to which all other words relate and refer, namely nouns and verbs, the understanding of which is fundamental to investigating an ideal system of justice, for without knowing what they mean and how they interact with ideas, we cannot speak or write about justice. Certainly, everyone will fancy that they already know what nouns and verbs are. But we will establish that very few understand the noun and verb, and that this misunderstanding generates a far greater amount of confusion among thinkers than most suppose.

THAT THE PRESENCE OF VARIOUS LANGUAGES DOES NOT RENDER IDEAS RELATIVE, AS PROVEN BY THE UNIVERSAL USE OF NOUNS AND VERBS.

Respondent counters by asserting that the existence of radically different languages, based on utterly different systems, makes our word and idea of justice a mere relative term, and this inherent vagueness warrants dismissal of the charge of injustice. We disagree for the following reasons. The words of all languages naturally fall into two primary categories, nouns and verbs. The noun is spatial and the verb temporal. By such we mean that, when alone, the noun has no existence in time, and the verb no existence in space. This is clear when one notices that the noun names some “thing” but does not place it in motion, which is the hallmark of time, as we demonstrated elsewhere.²⁵ It is thus without context, a mere idea named. Without the verb, a noun’s existence is tenseless. The verb, however, describes the manner in which a thing, a noun, exists temporally, putting it into temporal being. But alone, the verb has no object upon which to operate, about which it speaks. These definitions have but one exception each, for the noun “existence” is both spatial and temporal, as is the verb “being.” Hence, it is through the union of a noun and verb that a spatio-temporal assertion may be made. These unions will be sentences, but not all will be useful in our analysis of justice. Rather, only those which are as well propositions will be useful.²⁶ This creation of a proposition through the marriage of noun and verb sheds light on our earlier conclusion regarding the absolute nature of names, for if names are indefinite, so will be the proposition formed by the noun and its predicative verb. If

²⁴ Aristotle, *On Interpretation*, Chapter I, at 16a5.

²⁵ In *The Sophomoric Discourses*, time was shown to consist in the successive states of matter and was only knowable in the presence of change, i.e. motion. See *The Sophomoric Discourses*, Book I, Chapter I.

²⁶ For those who would criticize the omission here of prepositions, adjectives, articles &c., these are irrelevant to the discussion of the basic requisites for truth-forming utterances, as Plutarch clarified in his *Moralia*, Platonic Questions, Question X. See also Plato, *Sophist*, 262A.

there are no right and wrong names, there can be no utterances of falsity or truth.²⁷

It is necessary to understand the noun-verb relationship to derive the truth, the essence, of a proposition, and to refute those who will invariably attempt to circumvent logic and reason by claiming that different languages are immune to truths phrased in English. Certainly languages are different, but truths do not change, and the phraseology of any language may be refined into a noun-verb concept, which, if a proposition, will admit of truth or falsity. Therefore, let nobody trick us by invoking the glamorous and perplexing nuances of foreign languages and culture, for they are at heart governed by the same noun-verb structure as ours.

Notice that the solitary verb, while having meaning, yet has no independent meaning, being merely something said of something else, either predicable thereof or present therein. As such, it expresses no judgment, either positive or negative, just as the verb “swims” cannot alone be said either true or false. We cannot even *opine* that it is true or false, for the mere verb does not admit of such. But if one allows the verb to couple with and refer to a noun, it may become a proposition, such as “she swims,” about which we may allege truth or the reverse. But let us not make the mistake of thinking that the truth and falsity of all sentences can be debated. Only those sentences which are as well propositions can be true or false, not those which fail to assert anything, such as, “God, grant me strength.” Therefore we must not argue about the nature of the ideal system of justice by saying such things as, “Senators, legislate justly,” or “hear justice,” or “conceptualize justice,” as might a Taoist. Their method, while quite useful in some fields, will only lead us astray here, as it encourages us to judge that which admits of no truth or falsity. We must confine our methodology to the use of propositions, of which there are two types, affirmations and denials.

Therefore, since languages all rely on the same basic logic, the existence of radically different languages, do not make justice relative, despite different sounds and grammar, and consequently do not warrant dismissal of the charge of injustice.

THAT THE POSSIBILITY OF DIFFERING DEFINITIONS DOES NOT JUSTIFY RELATIVISM, FOR ONE MUST BE MORE RIGHT THAN THE REST.

Respondent United States argues that the existence of many varying definitions of justice around the world and among all peoples makes the term vague and warrants dismissing the charges of injustice. We disagree. We will not permit the Respondent to avoid the imperatives of logic; they may not invoke relativism in order to escape a definition or conclusion they dislike. Frequently, interlocutors try to justify their mutual differences by allowing that each has his or her own definition of the matter under debate. Such an allowance itself is not improper, and probably is inevitable, but it becomes fatal when the further assumption is made that both definitions are equally true. This merely means that both opinions are true for each party, a contention we have already shown to be the pitch of foolishness. Here, that contention is hiding in

²⁷ Plato, *Cratylus*, from 384 B.

the opinion of a definition. To say that our definitions are different is merely to say that our opinions are different, and if different, one must be closer to the truth than the other. If each is equidistant from the truth, in the same way and in the same respect, then the opinions are not in fact different. They are the same with respect to the object defined.

THAT RELATIVISTS TEND TO EMPLOY EQUIVOCATION, WEAK INDUCTIONS, AND DIVERSIONARY ARGUMENTS RATHER THAN ACCEPT A LOGICALLY IMPERATIVE RESULT.

We must confess that we are disappointed with the overall conduct of the lawyers in this case thus far, for both Petitioner's and Respondent's lawyers seem far too willing to resort to equivocation, weak inductions, and diversionary arguments. We well know that lawyers are often more interested in winning than in the truth, and that this zealous representation and adversarial spirit tends to sharpen issues and refine debate in judicial proceedings. However, we must draw the line at these common types of foolishness, which are often the refuge of the intellectually timid, namely recourse to equivocation, diversion and hasty generalization.

The fallacy of equivocation occurs in syllogistic reasoning where a common middle term has different meanings with respect to the terms preceding and following it. The word switches meanings in the middle of the argument. It is a definitional slight of hand, easily recognized in the following example: "Running requires athletic shoes. I am running for President. Therefore, I must have athletic shoes." Running means one thing in the first premise and another in the second, and thus the conclusion does not logically follow. While nobody would make the above equivocation, more clever ones abound, all the more poisonous for their subtlety. In our study of justice, one finds theorists who use the term "law" in equivocal senses. For example, "All laws should benefit society. It is a natural law that all humans will one day die. Since this does not benefit society, it should not be a law." This particular equivocation is so common that we have determined to preempt it outright by warning everyone of it here. When the term "law" is used in different senses, we must untangle the various meanings and examine which is really law, rather than equivocate our way into a pleasing but meaningless conclusion.

Another trick we warn both counsel against using is the fallacy of diversion, or the red herring, which consists in changing the issue in the middle of the argument, in order to appear to have proved the original issue by successfully proving the new one. Following is an example. "It is wrong to tax the poor, because poverty is a human tragedy and nobody would chose to be poor if they could avoid it." The conclusion appears to be true. Few would chose to be poor. But in no way does this prove that the poor should not be taxed. It does not support or condemn taxation. The red herring nickname was coined because hunting hounds could be successfully thrown off the track of their prey by dragging a red herring across the scent trail, just as interlocutors can be thrown off the logical track by dragging a new conclusion before them. In the field of justice, this is often done by adducing intricate but irrelevant examples, and then failing to return to the original point. For instance, in a debate about just laws,

many writers, while arguing that tort liability should be expanded, adduce life-shattering accidents and conclude after many pages that these were indeed horrible occurrences. This conclusion seems correct after endless, graphic depictions of suffering. But the gore does not support the conclusion that liability should increase. It also occurs in friendly discussions, where everyone wants to tell a personal anecdote related to each point at issue. After relating their story, they often either fail to return to the original point, or another relates his or her story in turn, and the group assumes that the anecdotes somehow proved the matter, usually without arriving at any logical conclusion. We must avoid these diversionary conclusions as we investigate the ideal system of justice.

The worst form of diversion is the expression “we agreed to disagree.” It is a contradiction, as it implies that we did not really disagree. It diverts the original debate about subject *x*, by concluding that there is a debate about subject *x*, and that such acknowledgment resolves the debate. However the argument was not about the existence of the disagreement. Concluding that the disagreement exists is a new conclusion introduced in order to fallaciously resolve the original argument. It masquerades as politeness, thereby gaining a legitimacy it does not deserve. It also revives the relativism we have worked so hard to banish from our discourses, as agreeing to disagree implies that both parties right, hence there is no real truth.

The final fallacy we will discuss is that of weak induction, also called the hasty generalization, which is the inference of a general proposition from inadequate particular instances. For example, “Stuart is always late to work. He never gets anywhere on time.” Stuart’s timeliness in all matters cannot be adequately inferred from his timeliness in just one matter. He may be late to work but punctual for every tee time. This fallacy is easy to see in the abstract, and nearly impossible to resist in practice. We know it would be foolish to infer that all the marbles in a sack were red after removing just one which happened to be red. The rest might be any color at all. After seven or eight repetitions, each of which produced a red marble, we would feel stronger about the conclusion that all the rest were red, and after drawing fifty red marbles in a row, we would be certain that all those remaining in the sack were red. But in our lives, one brush with outrageous injustice impels us to conclude that the court system is unjust. Suffering under an Oligarchy can constrain a people to say that all government is bad. Personal injury is often the seed of weak induction, and thus we must guard against this fallacy with vigilance. The subject of justice is personal to everyone, and all have personal tales and examples deeply important to them, which they are at pains to inject into every corner of the discussion, as if we were really discussing their biography rather than a system for all people. Such personal anecdotes are usually dangerous to a balanced inquiry of justice.²⁸

We will not review more of the fallacies here, as we have focused on only those which the lawyers herein have attempted to hurl at each other. We remind both that a steady patience is needed to thwart illogic, emotionalism, and relativism throughout these and all logical proceedings.

²⁸ For a summary of the fallacies, see *The Art of Reasoning*, Chapter VI, or for the purist, see Aristotle’s *Posterior Analytics*, Books I and II, from 71a1.

THAT WE HAVE PROVEN THE TRUE NATURE OF JUSTICE TO BE ABSOLUTE.

At the request of the Respondent, we shall take a moment and summarize what we have derived about the nature of justice. We have proved that the true nature of justice must be absolute. This is because there are such things as absolute truth and absolute good, and as an idea, justice partakes of this absolute nature. We have also proven that opinions about justice are not *ipso facto* true, but may correspond to the true nature of justice. But we have left one common criticism unanswered, namely, the contention that since all opinions are not truth, they must be all equally good. We shall answer that now.

It must be conceded that while opinions are *ipso facto* not truth, some are better than others. That is to say, some opinions are closer to the truth than others. Thus, let nobody argue that since no opinion is truth, all opinions are thus equal and any opinion is as useful or as good as any other. No opinion is, itself, truth, but each opinion is closer or further from the truth; opinions may closely correspond to the truth or differ from it drastically, and thus some opinions are better than others. There is no room for relativism here. But many will claim that, since everyone is entitled to his or her opinion, each opinion is therefore of equal validity. This sounds tidy and fair, but it is a thinly veiled attempt to assert that all opinions are equally true, which they are not. Let us prove this before moving on.

That some opinions are better than others is evident from our daily activities. If I were interested in fixing my car, I would sooner consult a mechanic than a medic. If I were interested in improving my muscles, I would seek the advice of an athletic trainer rather than a computer technician, and if I were curious about the making of boats, I would be better advised by a marine architect than a trainer of horses. In each case, we seek the party whose opinions are probably best on the subject, and by best, we mean the closest to the truth. In no case do we intentionally seek out the ignorant, though they too, certainly, have opinions to offer. In fact, it is owing to this belief that specialists of all kinds exist, and the wider the field of their specialization, the wiser we consider them; it is therefore that we seek the opinions of professors and count the time we use listening to them well spent. If all opinions were equally true or useful, we would have no reason to seek the advice of others, since our original opinions would be just as good as theirs. Thus, logically and experientially, some opinions are better than others, although no opinion is itself "truth," as we said before.

THAT THERE ARE TWO POPULAR CONCEPTIONS OF JUSTICE: THAT IT IS A TRANSCENDENTAL ABSOLUTE, AND THAT IT IS MERELY THE OPINION OF THE STRONGEST.

Respondent alleges that, even if there were an absolute truth and an absolute meaning to words, it would still be impossible for its government and justice system to be unjust, because whatever it considers just becomes just *automatically*, since it is the state, the law, the power, and the authority. Respondent alleges that upon its authority as the state, it may actually define what is just. We are aware that this is one

popular theory of justice. But as we will examine deeply, there are two conceptions of justice: that it is merely the opinion of the state—the opinion of the strongest—or alternatively, that it is a transcendental absolute and that things remain just or unjust despite what the state might say about them. The Respondent has enunciated the former conception. We hold that the latter is correct. These polar opposites form the axis about which the entire study of jurisprudence has revolved for over two millennia. We have already established the absolute nature of truth and good. But we have not yet gone far enough in proving whether the nature of justice is absolute or relative, whether it is transcendental and determinate, or whether, in the context of political reality, justice is defined by whoever is in power, i.e. by the interest of the strongest.

These two positions were first explicitly delineated by Plato.²⁹ Early in the *Republic*, he presents us with the story of Socrates debating the nature of justice with Thrasymachus, an unbalanced and impatient adversary.³⁰ Socrates asks him what he believes justice to be. Thrasymachus responds that justice is none other than the advantage of the strongest, which he clarifies to mean the advantage of the established government, and he adds that obedience to the rulers is just. Under this idea of justice, just behavior consists in obedience to the government's rules, and nothing more. It is a denial of any principle of natural justice and an affirmation that justice is synonymous with lawfulness, as justice is only whatever the government says it is. This is exactly the argument Respondent has made herein.

Plato, however, shatters this argument by pointing out that, since rulers are fallible and sometimes accidentally legislate against their interests, Thrasymachus' definition of justice entails a contradiction; in cases of incompetent legislation, a subject cannot both obey the laws and at the same time heed the interests of the government, as one objective defeats the other.

Plato depicts Thrasymachus' point of view dramatically by describing the jesting which immediately precedes the above discussion. There, Thrasymachus tauntingly demands that Socrates suggest what the penalty should be for losing the upcoming debate about justice. Socrates answers that his punishment should be the same as for all who are proved to not know, namely to be taught. But this is not good enough for Thrasymachus, who desires a harsher punishment, a fine. The anecdote clarifies what Thrasymachus thinks: justice is making rules which force the weaker to pay.³¹ This is the ultimate expression of the idea that justice is merely the advantage of the stronger, that 'justice is power.' The notion is again presented after Thrasymachus loses the argument, where he mutters that Socrates is not tough enough to beat him in debate. This is yet another claim that power, not reason, decides issues, and that justice is nothing more than the use of this power. Under such a formulation, there can be no unjust laws, for every law would be just by virtue of its being the law, it would be *a priori* just. In essence, it asserts that justice is merely legality. The Respondent, by suggesting this defense, has made this popular but basic mistake.

²⁹ The first dramatic depiction, however, can be found in Sophocles' masterpiece, *Antigone*, which explores whether justice is the opinion of a regime or rather a transcendental principle.

³⁰ Plato, *Republic*, Book I, from 335 B.

³¹ Plato, *Republic*, Book I at 338 B-D

THAT POWER IS NOT JUSTICE.

Respondent's claim that justice is power cannot stand, nor can the derivative theory that justice is defined by legality. These represent the notion that justice is actually the opinion of the powerful, and we have already seen that opinion cannot be truth. Opinion may correspond to the truth, and likewise the laws of the powerful may be just, if they correspond to true justice. But they are not the measure of justice for the same reason that man is not the measure of all things. The opinions of human beings are relative. The truth is not.

Thus, the nature of justice cannot be an opinion, neither that of an individual nor a government. The opinion of a government is still an opinion and not causative of the truth any more than an individual's. If the government believes its laws just, that does not make them so. They may be just or the reverse, but not due to the government's opinion of the matter. Rather, it would be due to the congruity or lack thereof obtaining between the law and true justice.

Some would even argue that the opinion of a God is yet an opinion, a position seemingly more compelling when one considers the imperfect nature of the Pagan Gods, constantly squabbling and scheming. It is beyond our scope to inquire whether the opinions of an omniscient infinite deity on the subject of justice are, in themselves, truth, though it would seem that they would merely correspond to truth until they became the object of the divine will, whereupon they could become actual truth. An all-knowing God's opinion of justice could not fail to be a true opinion. Yet, unless God then proceeded to will his opinion into being, it seems that it would remain an opinion. Even afterwards, there would presumably remain the dichotomy between the opinion in the almighty mind and the otherness called justice which God just created, though they are nearly coeval. This is where we must abandon the topic, for further pursuit requires asking whether Gods opine at all, which in turn mandates positing an entire theology, which we shall not do here. This is probably a fatal omission, for without an understanding of the holy and the divine, how it is and whether it is, it may be impossible to identify justice, without which the ideal system of justice will irrevocably fall beyond our intellectual reach. Certainly, we would need to address this question. Petitioner and Respondent, however, have both instructed us to pass over this issue. Therefore we shall move on.

THAT JUSTICE IS ENTIRELY A SUBSET OF THE PRINCIPLE OF THE GOOD.

Respondent objects that we have wrongly assumed that what is good is always just, and what is just is always good. We have made no mistake, however, in this regard. As we said earlier, justice is the good related to the orderings of human beings, with respect to each other and the material world. Justice is thus the principle of goodness in the orderings of human affairs. But how can we so conclude? By what sophistry, Respondent asks, do we equate the good and the just? It is a fair enough question, but the answer will reveal no sophistry, just the logic of syllogistic reasoning, which commands the obedience of every rational mind.

Let us make plain the links which prove the just to be united with the good. Most will agree that wrongdoing means to do something bad, not good. Most will

also agree that to do something evil is likewise to do something bad, not good. Since wrongdoing and evil are thus both opposite of good, they are the same thing, for things which share an opposite are always identical. Moreover, most will agree that a just decision means not an evil or bad decision, but rather a good one. Likewise, most will realize that a just law means not a bad law or evil law, but rather a good law. Thus, the just means not bad and not evil, and thus it means the opposite of bad and evil, namely good. The just cannot logically find itself in opposition to the good for this reason. The just and the good are both the opposite of bad and evil, therefore, they are the same thing. Now, one could argue that the just is but an instance of the good, and therefore different. They would be correct. However, this does not allow the just to be contradictory of the good. It is merely a subsidiary part of the good, and to be a part of the good, it cannot be bad. This is the logic which unites the good and the just and keeps them in perpetual partnership. The good can never logically be unjust, nor can the just be bad. If the good turns out to be unjust, it was not good. If the just turns out to be bad, it was not just. Therefore, it is a contradiction to say that it is good to be bad, or just to be bad, or good to be unjust. These statements are contradictions and therefore impossible. Keeping this in mind, it is elementary that injustice can never be more profitable than justice, that it is better to suffer a just punishment than to inflict one, and that the rational person would always rather suffer wrong than do it. Each of these is proved either by the inescapable coefficient of good and just, or the eternal opposition of good and bad. The good and the just are inseparable; the latter is a manifestation of the former and can never fall into opposition therewith.³²

THAT THE 'LAW AND ECONOMICS' SCHOOL IS UNKNOWNLY REVIVING PLATONIC PHILOSOPHY, AS IT RESTS ON THE MORAL PREMISE OF JUSTICE AS PART OF THE GOOD.

Respondent next moves to dismiss this case on the grounds that the 'Law and Economics' movement proves there to be no intrinsic moral theory in law, and that we therefore cannot hold the United States unjust for enacting or violating such 'amoral laws.' We disagree, since the law and economics school has actually posited a moral system and in doing so has breathed new life into what are essentially ancient doctrines of Platonic philosophy. Accordingly, Respondent may not justify its treatment of Petitioner by hiding behind this allegedly amoral, economic '*legal science*.'

Posner, the jurist most centrally identified with 'law and economics,' tells us that the economist does not answer questions concerning the goodness of particular economic arrangements, the justness of any particular deployment of resources, the rightness or evil of the distribution of wealth in society, or what a society's economic values should be. This is a mistake, for economics is an intrinsically moral subject, invested with a pervasive and pungent moral code. All transactions in society have a moral impact. For example, economists assume that studying the principles of economics is better than not studying them. This is a moral value, an admission that the good

³² Plato, *Gorgias*, from 476B, read with *Protagoras*, 361B.

life consists in possession of some kind of knowledge. Moreover, the idea that people are rational maximizers is a mere reiteration of Plato's favorite maxim that man never willingly errs, which we shall investigate later.³³ This intrinsic goodness of man is summed up by economists in the amoral scientific term rational maximization, but it means that people always do what they think is good for their interests. This principle is said by economists to be useful, which means it is "good" for something, which is yet another moral claim. In fact, every aspect of economics involves moral considerations.³⁴

For example, the vocabulary of economics contains latent moral concepts. Take the word surplus or deficit. The first is more than enough, the second, less. Enough is the right amount for something. The right amount is the good amount. Surplus is more good, deficit less so. Nobody talks about bad goods, or good bads, about surplus losses, unless the losses are profitable for someone, and thus not bad. When an economist talks about goods, he is implying that some 'things' are 'good', that they have worth, that they are in demand. Nothing could be a more pointed moral pronouncement than this. This sense of the word 'goods' is as old as literature itself. Homer writes time and again of banquets overflowing with piles of meat, heaps of bread, bowls filled with wine, and guests who "put their hands to the good things that lay ready before them."³⁵ The guests partook of the *goods* before them. The very statement that an item is considered good and not bad predetermines the moral thrust of all subsequent economic conclusions. For instance, calling wealth or satisfaction 'goods' leads to the inevitable conclusion that more wealth is better than less, or that more satisfaction is better than less. Such vocabulary betrays the utilitarian morality latent in economics.

Another moral concept used by economists is the word "value," or that which has worth, as proven by demand. Value and worth mean that someone thinks something is good. It is a description of somebody's, or some society's, ethical opinion. A demand curve, which economists insist is amoral, is a sum of moral preferences, the 'best' or *most good* quantities for given prices. Consent in transactions is a particular instance of somebody's opinion of the good. They believe it is good to trade the apple for the dollar. The word waste, used daily by economists, admits of no meaning but the moral. Waste is not merely the absence of use, but the absence of *good* use. Thus do all the tools and terms of economics deal with moral issues. Supply, demand, wealth, and profit all speak about peoples' opinions about the good in given transactions. In the final analysis, economics is inseparable from ethics.

This is not to criticize economics, but rather to censure those economists who mistakenly believe themselves to be *physicists*, describing billiard balls, when in reality they are making deeply moral pronouncements about what is a good life, a good economy, and a good market. Anyone who discusses the good has entered into an ethical discussion. When Posnerians apply economics to law, they can no more hide from moral implications than can the abstract economists. Returning to Respondent's contention that law is amoral, we must emphasize that the law is, if anything, more

³³ Plato, *Timaeus*, 86 E, *Protagoras*, 345 D, and *Laws*, 731 C.

³⁴ Posner's moral disclaimer appears in *An Economic Analysis of the Law*, Section 1.2.

³⁵ Homer, *Odyssey*. Book I, from line 140, also Book XX at line 257, the alpha and omega, respectively, of the *Odyssey*.

profoundly moral in its impact than even economics. Unfortunately, scientists in general like to avoid ethical considerations, which seem too indeterminate, too subjective, *too relative*, to be useful. Hence the absurd notion of amoral economics has obtained such currency that few people remain to point out the obvious, namely, that every economic system presupposes and reinforces an ethical underpinning.

We therefore reject the Respondent's contention that law is amoral due to its economic foundations. We instead recognize the intrinsically moral nature of economics as it bears upon the no less moral topic of justice. In this we are rejecting the pious nihilism Posner advanced in his work, *An Economic Analysis of the Law*.³⁶ Having done so, we will not allow the Respondent to set it up as a defense to Petitioner's claim of injustice. We avoid this error because justice analyzed amorally, through economics or otherwise is, to borrow Blackstone's phrase, nonsense upon stilts.

To be fair, Posner coyly admits that wealth maximization really is a moral system which creates rights, and not a bad one at that, in *The Economics of Justice*.³⁷ This would entirely comport with our opinion if it had been advanced as an ethical theory. However, Posner's adversion to ethics is merely to show that the *results* of wealth maximization are ethical under various other moral schemas, and hence wealth maximization is colored not as a moral system of its own, but as moral under other systems. Posner goes further down this path and demonstrates how wealth maximization has even better results than many other moral systems. But this is a rear-guard action, designed to silence the criticisms of those who require moral systems.

It is by positing the superiority of wealth maximization that Posner tacitly proffers it as a moral system in its own right. It is a shame this was not done earlier in *An Economic Analysis of the Law*, and it is regrettable that it was not finally done more fully and confidently than was the case. Posner's conclusion is less than emphatic. It is almost as if he makes the argument as *obiter dicta*, as if he means that, even if wealth maximization were a moral system, it would be better than utilitarianism or Pareto optimalism, but it still isn't a moral system.³⁸ By denominating it as a good measure of justice, however, Posner elevates it to a moral system, an ethic. We say this not to criticize, for Posner's project in *The Economics of Justice* is excellent, to describe and defend wealth maximization as an ethical system. The problem, however, lies first in the theory's lack of philosophical underpinning, and second, in the public's inability to readily see goodness and justice in terms of wealth. This is not to say that the theory is wrong, but merely to focus on how it has been oversimplified by Posner and misunderstood by the public.

What Posner tried to say was that the materially good life really is the good life. Wealth maximization is a good doctrine when understood within the context of and supported by certain classical ethics. But alone, the claim cannot stand, since the material is not the good or the true. It is at odds with the Western tradition of Judeo-Christian ethics because they renounce the worship of materiality, and though the modern world is filled with moral relativists, most cling to undigested notions of the badness of material greed, which they suspect lies at the bottom of wealth maximiza-

³⁶ Posner, *An Economic Analysis of the Law*, Part I, Chapter II.

³⁷ Posner, *The Economics of Justice*, Chapter I, Section III and IV.

³⁸ Pareto Optimalism is to improve the whole without impairing a part.

tion. In order to dissipate this popular antipathy, wealth maximization must be shown as it relates to the metaphysical reality of the good life,³⁹ to love, to happiness, to the moral order of the universe. It does so relate, and we shall explore the mechanics of this relationship, examining the basic relationship of justice and the good life, if called upon by the parties to do so.

THAT ALL SCIENCES ARE VALUE-LADEN ENTERPRISES GROUNDED IN MORAL SCHEMES.

We deny the existence of any amoral ‘economic’ perspective to law, behind which the Respondent can hide from the Petitioner’s claim of injustice. Law may reflect economic principles, but economics itself has a moral content, as do all sciences. Posner’s characterization of law as codified economics does not enable it to transcend moral questions, and suggestions to the contrary have given Law-and-Economics a bad name.

Economics is an efficient abstraction for analyzing political questions. But it is an abstraction which must be translated back into values and meanings which humans experience as real if it is to be of any use to humanity. Economic analysis is a means, whereas human life is concerned with ends. The result is that economics fails on its own to answer the questions, “why am I here; what should I do; what is the good life; what is a good country; and what is a good court.” This is where Posner failed, priceless as his contribution has been. Posner’s work may last for hundreds of years. But the critics are right in accusing him of failing to connect his theories of the economic good with the human good, the good state, the good person, and the good life. His theory cannot answer *even one* of these fundamental human questions, though it could be made to do so if only he had applied his economic findings to a well thought-out moral theory. Had he connected economics with its parent, namely moral philosophy, he would not have missed his chance to enter the pantheon of mankind’s intellectual heroes. He is criticized for quantifying without addressing qualities and human meanings. By substituting a quantity for human feelings and beliefs, he has successfully applied the tool of the economic point of view, and derives useful conclusions, but these must be retranslated back out of the quantitative nomenclature and into a system of human meanings and feelings. Economics cannot answer the question of “should.” That is a moral question, and that is why, frankly, many scholars hate Posner.

Our contention that economics is an intrinsically moral adventure may have convinced some, but we must drive home the point. Economics, like every empirical science, particularly social science, claims to be a value free, descriptive enterprise, with no proscriptive traits or normative pretensions. The sciences proclaim themselves unable to answer moral or value questions. But what Strauss so forcefully pointed out in the context of social science is eminently applicable to economics, namely that the economist’s knowledge of values directs all of his empirical efforts; he aims at deriving theorems of practical value, locating means to the ends he conceives as right and good. For this purpose, he must understand from the outset the ends of the “science” he undertakes, and hence his descriptive findings are *ex ante*

³⁹ Metaphysical; Ancient Gr. lit beyond physical, non-physical, ideal. This term does not mean mysterious or superstitious. It refers to immaterial things, or non-material things, such as thoughts and ideas.

within the context of the moral ends. Therefore, none can doubt but that in economics, “the end belongs to the same science as the means.”⁴⁰ The Czech philosopher Kohák phrased it thus: “all inquiry is value-laden.”⁴¹ Every science is anchored in moral values which cannot honestly be denied. The moral disclaimers of empirical sciences in general constitute an ethical nihilism, an intellectual fraud concealed from and perpetrated upon the public at large. Inevitably, the so-called amoral sciences will be defended as useful perspectives for deriving theorems which explain and predict phenomena, but those who set up such a defense on science’s behalf cannot justify the perversion of thought which has occurred throughout the spectrum of sciences as this “perspective” has ceased to be merely a perspective and has taken to masquerade as reality: amoral, nihilistic and therefore meaningless. Science, so conceived, is not rational; it is the dark inverse of reason. We say that the scientific perspective renders reality meaningless not for melodrama, but because the organizing structures of human consciousness are *meanings*, value judgments, and as the scientific perspective strives to be value-free, it is meaning-free and therefore anomalous to our conscious knowing of the world.

Our *episteme*, our way of knowing the world, is by understanding the relations which obtain among all things, the purpose and role of each part in the context of the whole. This is not ontology, since irrespective of whether we know the *per se* goodness of things, we clearly see them in context of their purpose, and in this we are discussing rather teleology, goal orientation. Teleology as an epistemological system is a world of meanings, values and purposes. It is foreign to the modern conception of science. Teleology was expelled from the scientific method long ago, notably by Galileo in his *Dialog Concerning Two Chief World Systems*, in 1632, and then by Newton in his *Mathematical Principles of Natural Philosophy*, in 1687.⁴² Three hundred years later, its odor wafts about the corners and cellars of utilitarianism. In the meantime, science has supervened, and we find it difficult to step back out of this scientific perspective and into the world of values and meanings which is natural to the human consciousness. This is why many will still thoughtlessly argue that it is the ethical worldview, not the scientific, which is the mere “perspective.” This knee-jerk empiricism stems from the moral relativism of the sciences, and we have already demonstrated the intellectual bankruptcy of relativism. Reality has a moral superstructure despite the apoplectic protestations of science. As Kohák reminded us ever so gently, “a value-free reality is a hopeless fiction.”⁴³

The expungement of values from the scientific outlook, no longer a mere “useful perspective,” but now a worldview, is an intellectual fraud. Those who confine their studies to the thought of the late nineteenth and twentieth centuries will have little way of ever discovering the scope of this swindle. It has slowly become orthodox. Still, anyone may venture out into the dusk and witness the swelling of the dark primordial night under the hemlocks, and view the world as humans knew it for millennia. We gaze at the embers of the fire and the stars above and know that the

⁴⁰ Aristotle, *Physics*, Book II, Chapter II, at 194a26, as cited by Strauss, *Natural Right and History*, Chapter II

⁴¹ Lectures on the Methodology of the Human Sciences, given at Boston University, 1989, and written in *The Embers and The Stars*, Chapters 1-3.

⁴² Newton, *Mathematical Principles of Natural Philosophy*, Book III, especially Rules of Philosophical Reasoning, Rule III.

⁴³ Kohák, *The Embers and The Stars*, Chapter III.

moral structure of the cosmos is a part of humanity, not an alternative to it.⁴⁴ We reject, therefore, Respondent's thesis that there is an amoral economic perspective to law, behind which they can hide from the moral scrutiny implicit in the Petitioner's claim of injustice.

THAT THE GOOD LIFE IS NOT STRICTLY THE MATERIALLY GOOD LIFE, BUT USUALLY INCLUDES IT.

Respondent next claims that even if law does admit of moral elements, it does not go so far as having a distinct theory of the good life, and lacking such, it is not truly a moral system. We must remind the Respondent, however, that justice cannot exist without a fixed notion of the good life, for without such, no judicial decision can be said to be good or bad. The justice or goodness of a decision must be in relation to something, and this something is the good life.⁴⁵ We have analyzed elsewhere how the good state contributes to the good life, and how the ideal justice system is merely a part of the good state.⁴⁶ But we must address the most fundamental question at this time, namely what is the good life at which all political institutions aim. This is a naïve question, and experienced thinkers know that naïve questions are not easy, but rather extraordinarily difficult. We all esteem that we know what the good life is. It is this opinion of the good life which informs our actions and decisions throughout our days. But only the philosophers inquire deeply into the matter. The answers they derive bewilder and frustrate as often as they enlighten, particularly those of the *moderns*, and especially the *physicists-cum-philosophers*, who are sometimes found lost in such deep thoughts, lost presumably because they are so seldom in that neighborhood.

Usually, these towering figures of intellectual repute, the modern empiricists, the scientists, the *physicists*, conclude that there is no real "good life," since it cannot be objectively and scientifically observed, quantified, and tested. This mistake is made because their methodology cannot derive cognitive meanings and purposes, without which the idea of good is unknowable, as we have seen. Since their tools don't work in the field of morality and ethics, they assume the fields not to exist. We have written much on this elsewhere and will pass over the opportunity to present a more finite critique of the shortcomings of the western sciences.⁴⁷ Suffice it to say that those who posit the absence of any good life are guilty of violating several elementary principles

⁴⁴ We borrow this from Kohák, *The Embers and the Stars*, Chapter III.

⁴⁵ Unless we are to surrender to ontology whereby good is intrinsically so, needing no predicative relation to any purpose. See Generally, Kant's *Critique of Pure Reason*, The Transcendental Doctrine of Elements, Part Second: Transcendental Logic, Second Division: Transcendental Dialectic, Book II, The Antimony of Pure Reason, and *a fortiori*, The Second Conflict of Transcendental Ideas.

⁴⁶ *The Sophomoric Discourses*, Book V and VI.

⁴⁷ *The Sophomoric Discourses*, Book II, Chapter IV, closely paraphrasing Kohák's *The Embers and The Stars*, Chapter II, Section II, both in reference to Hussurl's *Crisis of European Sciences and Transcendental Phenomenology: An Introduction to Phenomenological Philosophy*, Part I, § 2 and Part II, § 9, and his *Ideen II*, Section 1.

of reason. First, it is the fallacy of ignorance to deny the existence of something merely on the basis that it cannot be proven to exist. Secondly, it is a contradiction to attempt at once to be a good scientist, get a good job, be a good parent, and have a good retirement and at the same time deny believing in a ‘good life’ *per se*. Third, if they say that the good life is a relative term, that for me, the good life is thus and such, and for you not, then they have committed the intellectual suicide of relativism, which we have discussed so much already. We proved that there can be no “good for me, true for me, right for me,” and so on.

THAT UNIVERSAL ONTOLOGICAL GOODNESS IS NOT SO USEFUL IN ANALYZING IDEAL NATIONS OR SYSTEMS OF JUSTICE

Respondent next argues that if there is any moral structure inherent in reality, it is that the world and everything in it are by nature good, and thus its actions regarding Petitioner are likewise good, due to the intrinsic goodness of all, the goodness of the world and all its complexities. There are many who claim that all being is intrinsically good, i.e., that the world is ontologically good, or “given as good.” In *Candide*, Voltaire’s character Pangloss believed that everything was for the best, in this the best of all possible worlds. The impact of Panglossian or ontological goodness upon the search for the ideal system of justice presents several problems. It suggests the impossibility of relativism on the one hand, which is a welcomed result, but it arguably revives it upon closer analysis. If all is good by nature, there ceases to be a moral difference between things. It becomes impossible to say that something is better than something else, and consequently it becomes impossible to say that this law is good but that one bad, that this state is good and that one bad, that this is just and that is unjust. Thus, universal ontological goodness, while being a moral system, destroys moral comparison and evaluation. We concede that it is absolute, but it is useless in analyzing the utility of laws, the goodness of constitutions, or the justice of statutes. Therefore, we conclude that Respondent may not interpose universal ontological goodness as a defense to its treatment of Petitioner.

THAT ‘WHAT IS THE GOOD LIFE’ IS NOT A FOOLISH QUESTION, AND IS ANSWERED BY FINDING THE PURPOSE OF LIFE.

Respondent next insists that the case against it should be dismissed since, as we have said, justice requires a theory of the good life, which is an impossible question with no answer. We hold, on the contrary, that ‘what is the good life’ is not an impossible question and is answered by finding the purpose of life. Since justice is part of the good life, we must investigate what the good life really is, lest we fail to understand the part for ignorance of the whole.⁴⁸ How do we begin asking the question,

⁴⁸ As only such methodologically is appropriate. See Aristotle, *Metaphysics*, Book I, Chapter II, at 982a22. Read together with Book III, Chapter III at 998b23, and

“what is the good life”? It is a very simple matter. Let us ask the question in an easier context, and see just how simple it is. What is a good knife? Since a knife is a tool which cuts, a good knife is a tool which cuts well. And likewise, consider what a good loom is. A loom weaves thread into fabric, and a good loom weaves threads into fabric well. But a knife may cut as well as another and be also prettier or more expressively crafted, in which case we say that the prettier one is a better knife than the ugly one. This is true, but it says nothing about the goodness of the knife as a knife, the knife *qua* knife, but rather speaks of the knife as being better insofar as it is an object of art. So, the good knife is that which cuts well, and the good object of art is the more beautiful, expressive thing, assuming that ‘beauty and expressiveness’ is the purpose of art, a claim we have investigated at length elsewhere.⁴⁹ Therefore, it is easy to see that the goodness of a thing is related to its purpose, such that a thing which well accomplishes its purpose is good and that which does not is bad. Hence, in order to discern the goodness of anything, we must identify its purpose. To find the good life, we look for the purpose of life, and then design tools which accomplish it. The tools are political structures, and the result is justice.

THAT OUR SCIENTIFIC SKILLS HAVE OUT-PACED OUR POLITICAL ORGANIZATIONAL SKILLS

Respondent claims itself to be already perfect from the standpoint of the good life, as it is the most technologically advanced country on Earth. We believe, however, that excellent political systems, not technologies, afford the good life. We are surprised that Respondent has forgotten this, for the founding fathers of America conceived, as had others before them, that good political organization was the means to the good life.

Once again we may blame science. For more than a century, the scientific revolution has led people to believe that the good life would come purely from technological progress. Accordingly, people have concentrated on scientific achievements, while advancements in theories of political organization have become infrequent. Nevertheless, the good life is actually a result of political system, not technological advancement. The world was shocked back into this awareness in the Twentieth Century, when it discovered that new technology could render life hideous and even extinguish it altogether. As Einstein explained:

The benefits that the inventive genius of mankind has conferred on us in the last hundred years could make life happy and care free *if organization had been able to keep pace with technical progress*. As it is, these

Book VII, Chapter X, from 1035b5. Justice is defined in terms of Good, thus, it is a posterior part thereof and knowable only after a study of the prior whole. The reverse epistemology would be in error. (Formulae for x should not contain formulae for x’s constituents if the constituents are defined in terms of the x they make up, at 1035b8).

⁴⁹ The *Sophomoric Discourses*, Book VIII, Chapter II.

hard-won achievements are in the hands of our generation like a razor in the hands of a child of three.⁵⁰

Technology without enlightened political structures does not lead to the good life; it threatens all life. Life on Earth as we know it now depends on finding a structure capable of producing international peace, for general warfare can now destroy the entire planet and all its inhabitants within a matter of hours. Obviously, there can be neither the good life nor justice in such a situation. In this ultimate sense, justice requires peace, now more urgently than ever before. As Einstein also said:

The importance of securing international peace was recognized by the really great men of former generations. But the technical advances of our times have turned this ethical postulate into a matter of life and death...The development of mechanical methods of warfare is such that human life will become intolerable if people do not before long discover a way of preventing war.⁵¹

Einstein was not alone in expressing this truism; MacArthur, from the point of view of the military commander, said it as well, after using the first Atomic weapons against Imperial Japan:

I know war as few other men now living know it, and nothing to me is more revolting. I have long advocated its complete abolition, as its very destructiveness on both friend and foe has rendered it useless as a means of settling international disputes. Indeed, on the second day of September, 1945, just following the surrender of the Japanese nation on the battleship *Missouri*, I formally cautioned as follows:

‘Men since the beginning of time have sought peace. Various methods through the ages have been attempted to devise an international process to prevent or settle disputes between nations. From the very start workable methods were found in so far as individual citizens were concerned, but the mechanics of an instrumentality of larger international scope have never been successful. Military alliances, balances of power, leagues of nations, all in turn failed, leaving the only path to be by way of the crucible of war. The utter destructiveness of war now blocks out this alternative. We have had our last chance. If we will not devise some greater and more equitable system, our Armageddon will be at our door.’⁵²

Thus, contrary to Respondent’s assertion, technology alone does not generate the good life. Excellent political systems afford the good life. Technology is only helpful as it aids in the project of creating, supporting, and defending such political systems. In other respects, it threatens the good life.

⁵⁰ Einstein, *The World As I See It*. Part II, Politics And Pacifism, Section XI, The Disarmament Conference Of 1932, Subsection II (Italics supplied).

⁵¹ Einstein, *The World As I See It*. Part II, Sections I and III.

⁵² MacArthur, *Farewell Speech to Congress*, April 19, 1951.

THAT THE GOOD LIFE HAS BEEN MUCH INVESTIGATED AND A CONSENSUS EXISTS.

Now we must investigate what the purpose of life is, as we have done at length before. The most important breakthrough in the study of the good life is the realization that it is not simply a degree of financial, scientific or technological advancement. These are so many amplifications of the *means* of life, whereas the good life is a question of *ends and purposes*. But before we get to ends and purposes, let us think for a moment about the means to the good life.

The means to the good life consists in finding the purpose of human nature and developing systems which accommodate and enhance that purpose. We have written of the good life, i.e. the purpose of human nature, before and have not found reason to alter those theories. We will now, therefore, restate what the good life is, the purpose of human life, in maximum detail.

Petitioner and Respondent, however, both insist that we not. Instead, they both mutually agree to stipulate the truth of our prior findings without a summary and waive any objection to them in order to move this court forward into its analysis of justice itself. We are deeply disappointed in the shortsightedness of the parties in this regard. Nevertheless, we must move on if it is the will of the parties, since our jurisdiction to hear this case proceeds entirely upon their consent.

THAT NONE WHO WOULD BE JUST CAN DISREGARD LOGIC

Respondent rejoins that if consent is the foundation of our jurisdiction over this case, then they revoke such consent and move to dismiss the matter for lack of jurisdiction. Respondent may do so if they choose. We warn Respondent, however, that our jurisdiction is invoked by their consent to the following principles:

First; things equal to the same thing are also equal to each other. Second; if equals are added to equals, the results are equal. Third; if equals are subtracted from equals, the results are equal. Fourth; things that coincide are equal. And fifth; the whole is greater than the part.

We have authority to rule in a case only if both parties agree with each of these principles. If they consent to these principles, our authority follows as an automatic consequence. Respondent agreed with each of these propositions when filing its answer to Petitioner's appeal, which included a statement consenting to our jurisdiction over the matter. In this court, such consent can indeed be revoked and our authority destroyed, but only by explicitly rejecting any one of the five principles given above. We remind that both parties here are interested in justice—and none who would be just can disregard logic.

Respondent now reaffirms that it recognizes this court's jurisdictional authority to rule in this case. Respondent urges us, however, to amend the jurisdictional test to require our own obedience to these five principles, without which our jurisdiction should be vacated. We agree and will so amend.

We will now move forward into our analysis of justice itself, as per the wishes of the parties. Again, we are disappointed that the parties have chosen to focus on the

political means to the good life instead of taking the time to consider the nature of the good life first. But such are the wishes of the parties, and we will therefore proceed with our discussion of justice and the systems which give rise to it.

ARISTOTLE'S THEORETICAL FRAMEWORK OF JUSTICE

The classic formulations of justice are found in Plato and Aristotle. They remain definitive, and a brief review of them is an investment so productive of clarity and perspicacity that we decline to continue discussing this case until assured that everyone has a basic familiarity with them. We will therefore take a moment to review what the ancients had to say in this regard.

Aristotle tells us that justice is divided into two broad fields, the just in reference to humans, and the just in reference to laws and institutions. The former is the subject of individual virtue. The latter is the subject of social justice.⁵³ It is social justice which interests us, as Petitioner's claim has forced us to search not for the ideal person, but rather the ideal system of justice.⁵⁴ For convenience, we have provided a diagram summarizing the following points.

Aristotle explained that social justice has two popular meanings. It can mean either 'lawful' or 'fair and equal.' Most consider social justice to mean one of the two. In other words, people refer to laws and institutions as 'just' when these are either 1) lawful or 2) fair and equal. Aristotle named these *political* justice and *particular* justice respectively. Justice relating to the structure of laws is intrinsically political justice; and justice relating to individual cases is particular justice.

Aristotle distinguishes two sub-categories of political justice, one relating to laws benefiting the whole community, and one relating to laws simply in the ruler's self-interest. These latter laws are shown actually to be instances of injustice. Hence, of political justice, we are left with only those laws promoting the common interest. Aristotle then proceeds to discuss these laws.⁵⁵ Of these, he notes that there are two types, the naturally just and the conventionally just. A rule of justice which is universally observed is, if just, then naturally just, while a rule of justice obtaining intermittently among peoples is said to be merely conventionally just.⁵⁶ Conventionally just laws are, for example, those denominating weights and measures. These vary from place to place, whereas laws prohibiting murder tend to be universal among peoples and are thus (arguably) naturally just laws. Naturally just laws are thus general laws, based upon nature, resembling unwritten laws of equity, since many of these will be of a general and invariable character. The conventionally just laws, by comparison, are particular laws, variably established by each people in reference to themselves. These particular laws are of two types, written and unwritten, (a distinction equally applicable to general laws), both types necessarily concerning either the community as a whole or individual persons. A community law might prohibit draft

⁵³ Aristotle, *Nicomachean Ethics*, Book V, Chapter I, at 1129a30.

⁵⁴ We do concede that these are related topics, however, and we will not shrink from advancing theories of human nature and normative conduct. We remain ever respectful of Plato's great work, *The Republic*.

⁵⁵ Aristotle, *Nicomachean Ethics*, Book V, Chapter I, at 1129b15.

⁵⁶ Aristotle, *Nicomachean Ethics*, Book V, Chapter VII, at 1134b18.

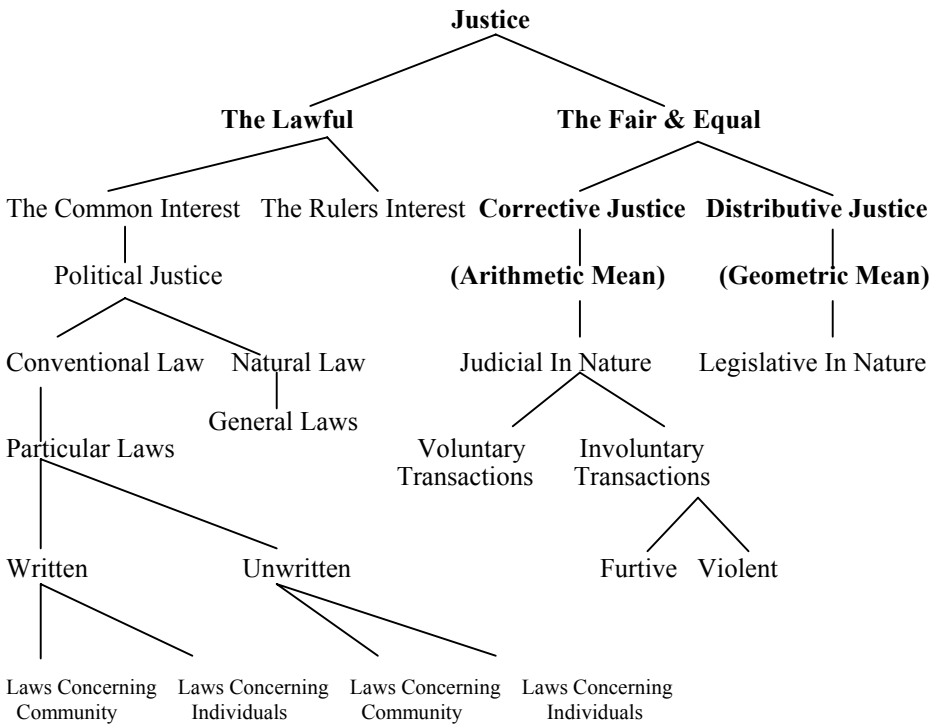
dodging, whereas an individual law might prohibit assault. In this way Aristotle described the field of justice as it related to laws and the lawful.

The other branch of justice, the fair and equal, formed a separate field according to Aristotle, namely that of individual or particular instances of justice, such as a lawsuit or the receipt of a state benefit. In one of Aristotle's most brilliant distinctions, he showed that all cases of individual, particular justice could be divided into two categories which he termed corrective and distributive justice.⁵⁷ Let us examine each carefully, keeping in mind that these distinctions will persist throughout our analysis of Respondent's constitution and bear heavily upon contemporary questions such as due process, equal protection, privileges and immunities, ex-post facto laws, bills of attainder, and the separation of powers.

Now we have already seen that whether something is or is not a law is irrelevant to justice. Therefore, the entire left side of Aristotle's diagram is not truly related to justice, though many think it is, namely those who mistakenly believe justice to be legality. For us, justice concerns only the right side of the diagram. Justice is a matter of fairness and equality, not legality.

⁵⁷ Aristotle, *Nicomachean Ethics*, Book V, Chapter I, at 1129b15.

ARISTOTLE ON JUSTICE⁵⁸



ARISTOTLE'S DISTINCTION BETWEEN DISTRIBUTIVE AND CORRECTIVE JUSTICE

Justice can always be described as some kind of equality. To find the justice of a situation, one must only find the equality inherent in it. Regarding just actions, any act which admits of a more and a less also has an equal, and hence a 'just.' Aristotle noted that in politics, such acts were invariably either distributions of honor, favors, goods, wealth, and the other divisible assets of the community, or they 'corrective' rectifications of some unfair transaction between parties. Crucially, Aristotle showed

⁵⁸ Not all parts of the chart are discussed herein. For full descriptions, see Aristotle, *Rhetoric*, Book I, Chapter XIII, and Aristotle, *Nicomachean Ethics*, Book V.

that deriving equality in the two cases was very different. Distributions and corrections featured two separate types of equality, and he provided formulas for finding each.

Corrective justice involves a transaction between parties, in which the exchange is unequal and requires equalization. It thus involves deciding controversies arising from discrete private transactions. Corrective justice requires applying an arithmetically proportionate equalizing principle to private transactions. The concise phraseology is confusing, but the principle is simple. An unjust transaction is by nature unequal and can be made just only by being equalized, which requires a subtraction from one side and an addition to the other. The amount transferred will render the transaction just only if it restores each party to an equal position. The calculation required is an arithmetical one, and thus corrective justice is understood to entail arithmetic proportionality.⁵⁹ Specifically, to restore equality to an unequal transaction, one must “take away from the greater portion that amount by which it exceeds one-half of the sum of both portions, and add it to the lesser portion.”⁶⁰ This will render both portions equal, the whole being equally divisible into two proper halves. In sum, corrective justice permits unequal private transactions to be equalized by application of an arithmetical proportion between the greater and the less.

Before leaving the topic of corrective justice, we must note that the arithmetical mean of corrective justice does not confine itself to purely voluntary transactions, such as those of the marketplace. It also applies to involuntary transactions, those lacking the consent of at least one party.⁶¹ Voluntary transactions include, for example, buying, selling, loaning with or without interest and renting. Involuntary transactions may be accidental, clandestine or violent. They include torts and even crimes, such as murder, theft, assault and battery.⁶² Thus, in each dispute involving the correctness of voluntary or involuntary transactions, equality, which is to say justice, may be found by applying the corrective principle of arithmetical proportionality.

As for distributions, Aristotle recognized that disproportionate governmental grants of wealth and honors were unjust. Distributions, he theorized, could be made just, that is, equal, by calculating a perfectly proportionate distribution. The classic example of such a proportionate distribution is, “give the big coat to the big boy and the small coat to the small boy.” This is a proportionately equal distribution. Certainly, this distribution is not strictly equal: the coats are different sizes. But *they are equal in proportion to the size of the boys*, and this is the key to distributive justice. Under distributive justice, distributions are not strictly equal; rather they are equal taking into account the differences among the donees. It is therefore a different kind of equality than corrective justice.

Mathematically speaking, this proportion is an equality of ratios. There are four terms here: two boys and two coats, and the difference between the coats equals that

⁵⁹ This is not proportional, strictly speaking, but rather an arithmetic progression admitting of equality

⁶⁰ Aristotle, *Nicomachean Ethics*, Book V, Chapter VI, at 1132a25.

⁶¹ Aristotle, *Nicomachean Ethics*, Book V, Chapter III, at 1131a5.

⁶² So-called victimless crimes, like fornication, fit into this classification only if an injured party can be identified who did not consent to the injury, such as society as a whole.

between the boys. Distributive justice thus necessarily involves at least four terms, namely, two donees, and two shares which are proportionate in relation to them.⁶³ This is technically a geometric proportion wherein the difference between terms A and B obtains between terms C and D, written thus: $A:B::C:D$. For such a geometric proportion to be equal, the first and third terms must bear an identical fractional relationship to the second and fourth. Thus in the example 2:4::8:16, the first and third terms are both doubled in the second and fourth. The second and fourth terms are therefore equal in this respect. This formula describes a just distribution of shares.⁶⁴ This formula equitably governs state distributions to the people of wealth, honors, rights or other things. Thus, distributive justice is found by applying a geometric mean, and it applies to the distributions made by the state to various parties.

THAT DISTRIBUTIVE JUSTICE INCLUDES THE REVERSE CONCEPT OF INTRUSIVE JUSTICE

Although Aristotle seems to have passed over the point, distributive justice applies not only to government distributions of desirable things, but also to its assignment of burdens, impositions, exactions, taxes, etc. These are the undesirables which the government distributes. This distribution of burdens is intrinsically part of distributive justice. However, since it embraces an opposite idea, namely government imposition instead of government benefit, it deserves to be individually recognized. We may call it 'intrusive justice', for although it operates according to the same principle as distributive justice, it applies to the intrusions of government upon the people. Thus, let us allow intrusive justice to name the just way of allocating the bads, while distributive justice includes it but nonetheless connotes a distribution of government's goods. Henceforth, when distributive justice is implicated, we must not forget that it may in fact be the intrusive variety of distributive justice, if such government distribution is partially intrusive or burdensome. In fact, a distribution of desirables may have intrusive attributes if it benefits some more than others, for those receiving less will be relatively disadvantaged, even though they, too, benefit. This is merely a recognition of the fact that every benefit can be expressed by its obverse effect, upon the remaining under-benefited persons or things. To 'benefit only A' means to 'relatively impair things other than A.' This distributive/intrusive distinction will have a profound effect upon constitutional jurisprudence, as we shall see. However, let us now observe the practical differences between corrective and distributive justice and consider the mischief which attends the confutation of the two.

⁶³ Aristotle, *Nicomachean Ethics*, at 1131a10.

⁶⁴ Aristotle, *Nicomachean Ethics*, Book V, Chapter III, at 131b10.

THAT THE INJUSTICES OF EMOTIONAL COURT DECISIONS, FAVORITISM, AND SELECTIVE ENFORCEMENT ACTUALLY ARISE FROM MISTAKEN USES OF DISTRIBUTIVE INSTEAD OF CORRECTIVE JUSTICE

Respondent argues that Aristotle and his distinctions are ancient and therefore irrelevant to the United States of America. We disagree. These ancient distinctions are not mere relics or obscure curiosities. They are essential to a thoughtful analysis of Respondent's justice system. This can be proven by observing the operation of the corrective/distributive distinction within contemporary political entities like courts and legislatures.

When courts are accused of bias, when police are charged with selective enforcement of the law, when prosecutors are criticized for failing to prosecute important crimes, when a judge or jury is criticized for making a choice based on the emotional display of a party, we allege injustice. But what renders these things unjust? The shallow answer is that the involvement of bias renders these unjust. There is a deeper answer, for bias may, when coincident with truth, accidentally yield a just result. Bias is therefore not the determinant of injustice. The deeper answer is that these cases all involve the application of the wrong type of justice; they each feature an application of distributive justice when, in fact, judges, prosecutors, juries and policemen are supposed to abstain from such. Judges and juries are supposed to implement corrective justice; prosecutors and policemen are supposed to execute the laws. Neither is supposed to distribute the favors and rewards of society. Socrates emphasized this distinction when defending himself at his own trial in Plato's *Apology*:

Perhaps some of you jurors may be offended...and [vote against me] in anger...when you remember your own conduct [before the court], if you, even in a case of less importance than this, begged and besought the judges with many tears, and brought forward your children to arouse compassion, and many other friends and relatives; whereas I will do none of these, though I am, apparently, in the very greatest danger....I have three sons...nevertheless, I shall not bring them here and beg you to acquit me. And why shall I not do so?...I think it is not right to implore the judges or to get acquitted by begging; Rather, we ought to inform and convince [the judges]. *For the judge is not here to grant favors in matters of justice, but to give judgment, and his oath binds him not to do favors according to his pleasure, but to judge according to the laws.*⁶⁵

We have often noticed self-righteous judges claiming that that their lenience was admirable in some matter, or that the anger of the jury reflected a just resentment, and so on. Clearly, it is the surreptitious replacement of corrective by distributive justice

⁶⁵ Plato, *Apology*, 34C-35E (Emphasis supplied, translation updated for clarity).

that at once renders such acts unjust and yet clothes them with an image of justice. Since the court's power is usually one of sanction, this is not only an abuse of distributive justice, but, more specifically, an abusive use of intrusive justice. The fact that distributive justice is respectful when used in its appropriate forum places an undeserved aura of justice upon the unjust and biased acts of judges, juries, prosecutors, and police, arising from a purloined use of distributive justice. This switch, this slight of hand between types of justice, allows injustice to masquerade as justice. The application of Aristotle's theorems discloses this fraud for what it truly is.

THAT, INVERSELY, WHEN GOVERNMENTS DISTRIBUTE OR INTRUDE ACCORDING TO CORRECTIVE JUSTICE, THE OPPOSITE INJUSTICE IS DONE

Arithmetic corrective procedures must never be used to determine distributive questions, for the result is always imbalance, three dimensional disproportionality, followed usually by public unrest. We advert to three-dimensionality here because corrective justice involves a ratio of two things, which appears two dimensional, while distributive justice involves a compound ratio of four things, which appears three-dimensional. Moreover, it is often easier to see how the equality of corrective justice is unequal in a distributive sense when cast into spatial terms: a shape symmetrical in the second dimension is not symmetrical in the third dimension. Symmetry is not a three-dimensional concept: it cannot truly exist in the third dimension except in the case of the sphere, and no two-dimensional circle is a sphere. Equality in the second dimension is always unequal in the third. In this manner, we may see that equality in corrective matters is unequal in distributive matters. It is not an overstatement to say that distributive justice is spherical, that legislation must be spherical.

This is why economic leveling is an unjust form of distribution in principle. It is a corrective procedure applied to a distributive question. The only way in which geometrically proportionate distribution results in numerically equal payments to everyone is if every person is found to be exactly identical, and this is an impossibility. It is to hypothetically achieve such an identical composition of all people that Rawls suggested his veil of ignorance, after which he is able to justify arithmetically equal distributions to all. Additionally, declarations of rights are not zero-sum games and must not be undertaken with arithmetic equality. Unequal rights are in some cases absolutely necessary, for the donee of rights at the expense of others can sometimes exercise such to the ultimate benefit of those dispossessed, resulting in an increase in rights among the dispossessed themselves which never would have arisen but for the initial inequitable disbursement. Thus, economic leveling, or levelings of legal status, are both subjects for distributive justice and hence geometric equality, but they are not proper topics for mere arithmetic equality.

THAT DISTRIBUTIVE AND CORRECTIVE JUSTICE ACTUALLY DEFINE THE LEGISLATIVE AND JUDICIAL FUNCTIONS OF GOVERNMENT, AND THUS DELINEATE THE PRINCIPLE OF THE FUNCTIONAL SEPARATION OF POWERS

The injustices arising from the wrongful uses of corrective and distributive justice indicate that each has a proper function which cannot be performed by the other. Each is a separate tool, uniquely capable of attaining its given end. Corrective justice is capable of resolving disputes among parties equitably, whereas distributive justice guides the lawmaking process, whereby society's wealth and privileges are regulated. Thus, corrective justice is naturally and intrinsically adjudicative, while distributive justice is legislative.

Petitioner has expressed her worry that since this separation of powers relationship is not found in Aristotle and is of our own invention, the Respondent might object to it. We concede that we have added this to Aristotle's theory, and we forewarn both parties that this will not be the last such innovation. In any event, we assure the Petitioner that Respondent's potential objection to this innovation will certainly be overruled. Although Aristotle did not note this relationship, it is crucial. The functional distinctions between distributive justice, a legislative act, and corrective justice, an adjudicative act, embody the classifications of governmental action which may be used to separate governments into component parts, and can be used to show why the body which legislates theoretically must be separated from that which adjudicates. This separation of legislative from judicial functions forms the basic principle of the modern separation of government powers, as we will explore in great detail later. The separation of government powers by function allows for greater social justice partly due to the fact that mixing these functions, as we have just shown, causes injustice. This point must be remembered, for it will take on a vital importance when we analyze which constitutional structure are most just.

THAT WHEN EITHER A LEGISLATURE ATTEMPTS CORRECTIVE JUSTICE, OR A COURT PURSUES DISTRIBUTIVE JUSTICE, INJUSTICE USUALLY RESULTS

Judges cannot legislate. When they try, injustice automatically results. The same goes for legislators who try to adjudicate. This is because legislation and judging require opposite motivations. Good legislators must be motivated to heed the masses and live under laws they make; Good judges must be motivated *to ignore the masses and be immune from their own decisions*. Thus, judges are ideally appointed and legislators elected. In this way, each has the right motivation to do their job correctly. Judges will rule on the facts, and not according to social pressures, fears of retribution, or personal gain. Legislators will serve the people and legislate knowing they must live under their own laws. Unfortunately, each therefore has exactly the wrong motivation to do the others' job, and if they try to cross into one another's fields, they will do exactly the wrong thing nearly every time. Judges will decide cases by popularity and personal interest; legislators will enact burdensome laws without regard to the peoples' desire. Injustice will be carried everywhere.

An interested judge and a disinterested legislator are each an anathema to justice. Judges, being appointed, are immune to popular pressure, which makes them good at deciding cases based strictly on the facts alone, but poor lawmakers, as they are not subject to popular oversight and hence have no incentive to heed the interests of the majority. On the other hand, legislators, being elected, are constantly dependent for their tenure on public approval, and hence are motivated to legislate in the public's best interests. This, however, makes them into poor judges, as they tend to ignore facts and continue look rather to popular desires. Legislators cannot judge without a certain bias in favor of the majority, since their station in life depends on the pleasure of the masses that elect them. Thus, judges cannot legislate because they are not popularly accountable, and legislators cannot judge *precisely because they are*. Each has the right motivation to do their own job, and the wrong one to do the others'.

Habit is another reason, however, why judges and legislators cannot adequately perform one another's jobs, even if either or neither is accountable to the people. Those who are accustomed to make rules invariably handle adjudications as they would a rule-making exercise, treating each case not as an exercise in applying the law, but rather as an instance for munificence, benevolence, favor, or revenge, despite the written law. They forget to apply the law. Instead, they write law. They look to the parties' general merit and worth rather than the conduct at issue. They will not try to equalize the situation in question as required by corrective justice and will ignore the merits of the case. Instead, they will attempt a distribution of favor, such as acquittal or an award of damages, according to the needs of society or the merits of the people, like their faction, fame, infamy, wealth or poverty. The real merits of the case, however, may turn simply on whether a good person nevertheless was wrong in the instance, whether he actually assaulted the plaintiff, whether he materially breached the contract, whether he paid, indeed, more or less than was his obligation. The merits of the case are different from those of the individual, and lawmakers are not in the habit of remembering this.

This is a principle reason why 'trial by legislature' is inherently unjust. Legislators are supposed to be 'parties to the case' in their job as lawmakers; they are under the law and must be bound by the laws they make for others, or they will legislate unfairly. They are of the people, in this respect. Not so, judges, however, for they are not to be a party to the case; impartiality requires that they not be benefited or injured by the judgment they render. Legislators would by nature be parties to any case they were to hear, since their continuation in office would depend in part on election by the parties who came before them. In this manner, legislators are always parties to the cases they hear. This alone is enough to disqualify them from judicial competence. In summary, legislators and judges are improperly motivated to do one another's jobs. This is why judges must never legislate and legislators never adjudicate.

Now, Respondent asserts, and rightly so, that personal merits are often relevant to a court proceeding. The theft of food for a starving child may be less grievous than the same theft committed for purposes of ruining a confectionery competitor. A first-time defendant may be treated more leniently than a recidivist. Courts are often more generous with an inexperienced elderly woman when considering a contract dispute than with a professionally trained man. Are these not instances where adversion to the merit of the individual party is rightly used in deciding the merits of the case?

In such instances, the merit of the party is not the deciding factor, but it rather serves as evidence of the party's subjective state of mind regarding the event in ques-

tion at the time of the event. It is only if the party's virtue or merit is somehow probative or relevant to understanding the actual facts that it may be rightly considered by the judge or jury. This is not distributive justice, but rather still corrective justice, where the facts of the case, the differentials between parties to be corrected, are being measured, and veracity of evidence tested, by recourse to relevant character evidence. If unrelated to the issues of the case, the merit or virtue of the party must be ignored. This is the opposite of distributive justice, which measures the distribution directly against the relative merit or virtue of the party.

Regarding courts that attempt to legislate, these are as guilty of injustice as legislatures that attempt to judge cases. Judges have neither the competence nor the accountability to deal satisfactorily with policy questions and legislative issues. The legislator is experienced in crafting rules for the future guidance of all people, whereas the judge has little such expertise, as he is used to receiving ready-made laws and merely applying them to the past conduct of individuals or small groups. The judge's policy-making skills are limited to recognizing the collateral effects of his interpretations. Moreover, in most nations, the appointive nature of judicial positions places them beyond the accountability of the people; they should therefore not be permitted to legislate. Still, even if the political system is not based on consent mechanisms or elections at all, injustice nevertheless results if a court makes law since, as Blackstone noted, such laws are "contrary to all true forms of reasoning, [as] they argue from particulars to generals."⁶⁶ We know this from Aristotle, who made elaborate proofs of the same principal of correct reasoning. He detailed how human understanding of existence proceeds from the universal first causes down to particulars.⁶⁷ In the *Posterior Analytics*, he demonstrated the superiority of universal to particular demonstrations.⁶⁸ As a court is witness to only a particular demonstration in any particular case, it is therefore reckless for it to fashion a universal rule therefrom. But we shall return to this subject later.

THAT THE INADMISSIBILITY OF DISTRIBUTIVE CONSIDERATIONS IN CORRECTIVE JUSTICE IS EMBODIED IN AMERICA'S FEDERAL RULES OF EVIDENCE.

Respondent concedes that Aristotle's distributive and corrective justice may be germane in the ways we have outlined above, and contends that its very own Federal Rules of Evidence obey this corrective principle, proving that their system is, at least in this respect, just. We agree for the following reasons. The principle of corrective justice is embodied in the American Federal Rules of Evidence, which proscribe considerations useful to distributive justice unless they are materially related to the corrective procedure of a trial. For this reason, they significantly advance the functional separation of powers doctrine. For example, Article Four of the rules, which concerns the limits of relevancy, states that irrelevant evidence is not admissible, and evidence is relevant only if it has "any tendency to make the existence of any fact that

⁶⁶ Blackstone, *Commentaries*, Vol. 1, Introduction, Section 2.

⁶⁷ Aristotle, *Metaphysics*, Books 1-3.

⁶⁸ Aristotle, *Posterior Analytics*, Book I, Chapter 24, at 84b20.

is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁶⁹ Of particular interest are the restrictions upon character evidence. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion”⁷⁰ unless the accused himself offers such in self-defense, or it relates to the credibility of a witness, such as reputation for honesty, habit, or criminal history involving acts of dishonesty.⁷¹ Although a cursory description, this illustrates the confinement of judicial consideration to issues strictly relating to the facts of a case, those which pertain to the operation of corrective justice. Issues such as the repentant attitude of the accused, his parental responsibilities, or his value to the community as a famous or important figure, are removed from the legitimate scope of judicial inquiry. The judge is thereby limited in what may be considered in the disposition of a case.

Under the American rules, a judge is even prohibited from taking into consideration facts which he himself may believe to be true, but which are not matters of general agreement. This is known as the doctrine of judicial notice, as summarized in the Federal Rules of Evidence under Rule 201. “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.”⁷² This removes the judge’s authority to take notice unilaterally of irrelevant or disputable facts. The rule effectively constrains judges to eschew personal biases, preconceptions, and other considerations injurious to just adjudications under principles of corrective justice.

These very limits, however, are fatal to the enterprise of legislation. Though required by corrective justice, they thwart the very project of distributive justice, which must analyze the full nature of donees in order to determine just distributions.

Such judicially prohibited facts are critical to legislatures, which cannot fashion laws without considering the generalized merits and desserts of citizens, groups, classes, and factions. Legislation is intrinsically a biased undertaking and can only be rendered just by resort to mechanical structures of checks and balances. Adjudication is the reverse, intrinsically objective, though human nature requires no less resort to checks and balances to insure this objectivity. Therefore, recourse is had to the separation of responsibilities among judge and jury, and the adversarial structure whereby parties present arguments to a judge who does not proactively investigate as inquisitor. However, these topics will be explored in more depth later. Here, it is merely our point to recognize that corrective and distributive justice are intrinsically different processes, that the former is judicial and the latter legislative, that injustice results from both the judicial body’s exercise of distributive justice and the legislature’s exercise of corrective justice, and that the prohibitions in the Respondent’s Federal Rules of Evidence generally embody this separation. Respondent is therefore correct that its system is just in this respect. However, we caution Respondent that our favor-

⁶⁹ *Federal Rules of Evidence* (FRE), P.L. 93-595, 88 Stat. 1926, (1975) [H.R. 5463], Rules 402 and 401 respectively.

⁷⁰ FRE Rule 404(a)

⁷¹ See generally, FRE Rules 404(a)(1), 404(a)(3), 404(b), 607, 608, and 609.

⁷² FRE Rule 201(b), being for adjudicative facts only, as opposed to legislative facts.

able generalization in this regard will not insulate it from the possibility of adverse findings in other areas, even in specific rules of evidence.

We are cautious in our praise of the Respondent's Federal Rules of Evidence because Respondent's courts are governed by other, more broad sets of rules, which yet confuse the distinction between corrective and distributive justice. For example, the Federal Rules of Civil Procedure govern all civil suits in all United States District Courts. These rules, while generally supportive of the crucial separation of corrective and distributive justice, especially in their provisions for joinder and interpleader, contain problematic provisions. Most troublesome is Federal Rule of Evidence No. 11, against frivolous lawsuits. The rule is designed to punish those who make any written or oral presentation to the court with ulterior motives, such as harassing an opponent, causing unnecessary delay, or increasing the expense of litigation.⁷³ We understand that this furthers the interest of the entire nation in obtaining speedy and inexpensive adjudication of disputes. However, the rule goes on to prohibit claims, defenses, and legal contentions that are not warranted by existing law, or are a frivolous attempt to extend, modify, or reverse existing law or *the establishment of new law*. We are aware that many parties litigate absurd and outrageous theories which congest the courts and harass defendants. However, Rule 11 suggests that non-frivolous requests for a court to establish new law are acceptable. This is a mistake, for we have already seen that a court must not make law. Thus, Rule 11, while designed to thwart frivolous lawsuits, actually authorizes litigants to invite the court to legislate. The rule should be redrafted to require that all legal contentions not warranted by existing law, or which attempt frivolously to extend, modify, or reverse existing law, or establish new law, simply be addressed to a legislature, not a court. It is not a court's role to decide which suggestions for new laws are worthless or frivolous. That is the role of the legislature, and if an idea is frivolous, the legislature is free to ignore it. Anomalies like Rule 11 make us cautious in our wholesale approval of Respondent's courtroom rules and procedures, even though these generally support the separation of corrective and distributive justice.

THAT THE INADMISSIBILITY OF DISTRIBUTIVE CONSIDERATIONS IN CORRECTIVE JUSTICE IS ALSO EMBODIED IN THE NON-JUSTICIABILITY DOCTRINE AND ITS COMPONENT TEST FOR JUDICIAL STANDING.

Respondent also asks that we recognize the merit of its standing and non-justiciability doctrines, as they further separate corrective from distributive justice. We agree that the preclusion of distributive considerations from corrective justice is latent in the non-justiciability doctrine. The idea of justiciability attempts to delineate the scope of proper adjudicative power, a task identical to a demarcation of executive and legislative power collectively. The doctrine of non-justiciability defines the limits of corrective justice, and prohibits complaints and demands which may be brought before the court in the form of a lawsuit, but which are, nevertheless, simply requests

⁷³ Federal Rule of Civil Procedure No. 11(b)1.

for distributive justice. Such requests are termed ‘political questions’ and are deemed non-justiciable, since the proper venue for such requests is not the adjudicative body but rather the legislature, if the separation of powers is to be observed and justice prevail in both lawmaking and adjudication. A political question is a legislative question and therefore non-justiciable. There are two forms of such political questions, the first being those controversies which feature a party whose injury in fact is traceable to a political distribution, an act of distributive or invasive justice. The second are those controversies which feature no injury to the plaintiff. These are precluded from judicial consideration by the judicial standing doctrine and the ‘case and controversy’ language found in Article III, Section 2, of Respondent’s Constitution. This doctrine essentially enjoins the federal courts to hear only those cases which are bona-fide contests between adverse individuals, precisely the area where corrective justice is proper and distributive justice unjust. Standing requirements thus deny generalized grievances access to the third chamber; they kick legislative disputes out of the courtroom, effectively keeping corrective matters before the court and distributive matters before the legislature. We praise Respondent’s wisdom in observing these doctrines.

THAT JUDICIALLY RECOGNIZED COMMON LAW ENTAILS A POPULAR USE OF DISTRIBUTIVE POWER.

Respondent claims that the existence of common law, if duly applied by the judiciary to the people, indicates that the people themselves may directly make law, contradicting our position that the legislature must monopolize distributive justice. First, we have not said that distributive power must be monopolized by the legislature. Thus far, we have held only that distributive power must be kept from the judiciary and that it defines the correct conduct of a legislature. As we shall see, the legislature exercises an agency of which the people are principal. Distributive power, like all political power, initially resides in the people. For this reason, we cannot insist that legislative power belong to the legislature alone, for in such a case there would be no such power, as it would arise nowhere. We will visit these arguments in more detail later. Nevertheless, we must address the Respondent’s criticism insofar as it suggests that an institutionalized lawmaking power known as the common law resides in the people, as this seems to bear adversely upon our division of justice into corrective and distributive fields appropriate to the judiciary and legislature, respectively.

The common law is that body of social customs and habits which, although never written in statute or legislative act, has gradually been upheld by courts over the centuries. Some call this ‘judge-made’ law, though this is incorrect, for it is made by the whole society in its gradual formation of customs and habits; it is merely recognized and applied by the judges. Far from judge-made law, common law is people-made law. It is law made by the people without recourse to the agents they have established in the legislature for the purpose of lawmaking. The legislature shares lawmaking power with the people by nature, as their agent—but not their exclusive agent.

The judicial recognition of common law is useful for several reasons, all of which derive from the common law’s dynamic power and inure to the stability and efficiency of government. First, it allows the common sense of the group to evolve gradually laws reaching those minute or novel community issues which may have

escaped the attention of the legislature. Such lawmaking is often faster and more precise than the legislation of a lugubrious and far-away assembly. This reduces the friction between the people and their legislature. Second, it allows for greater accommodation of sectional differences, as customs evolve based on the logical imperatives of differing local circumstances. This, too, makes government more stable, as the inattention or partiality of a legislature can be remedied by institutional, local self-help. Third, the common law is phenomenally adaptive, for being the will of the people, it is responsive to whatever they are thinking and doing; it is ever aware of their problems, innovations and needs. It is never out of session. It never sleeps. Lastly, it is a surefooted guide for the legislature in lawmaking. Legislators are not Gods, and they must of necessity rely on the collective experiences and distilled wisdom of others handed down through the ages, the repository of which is the common law. For as Cicero noted, "...there never has lived a man possessed of so great genius that nothing could escape him, nor could the combined powers of all the men living at one time possibly make all necessary provisions for the future without the aid of actual experience and the test of time."⁷⁴

We must note that many constitutions and statutes expressly import the common law into the written laws of states. In such cases, the common lawmaking capacity would seem to be a delegated power of the legislature. However, as an agent of the people, the legislature's delegation back to its principal of that which it received therefrom is no delegation at all, but merely a return of delegated powers to their true owner.

Certainly, there are weaknesses to the presence of a popular power to exercise distributive justice, as found in a system of common law. These weakness, however, are precisely those which obtain when the people rule directly: the constitutional format known as pure Democracy. Although we will extensively analyze pure Democracy and its shortcomings later, we cannot pass over the topic of the common law without noting that it is, essentially, pure Democracy and contains the strengths and weaknesses thereof. Therefore, Respondent is correct in noting that the presence of the common law entails a sharing of distributive power by the legislature and the people. However, this does not violate what we have said about distributive and corrective justice, namely that they must not be concurrently exercised by the same institutional body, and that the nature of corrective justice is intrinsically adjudicative and that of distributive justice is intrinsically legislative.

Respondent asks whether the ability of the people to legislate implies their unsuitability to adjudicate. This is correct. When the people collectively assume the role of judge, they are unable to keep legislative considerations out of their minds, looking constantly to the distributive aspects of the questions before them. At their worst, they behave as a mob, giving heed to every species of emotionalism, illogic, and irrelevancy. and become vigilantes, taking into their hands the entire power of the legislature, judiciary, and executioner.

⁷⁴ Cicero, *De Republica*, Book II, Chapter I, section III, also noted in the same context as us by Kent, *Commentaries*, Volume I, Part III, Lecture XXI.

THAT JUDICIAL INTERPRETATIONS OF LAW MAY BE LEGISLATIVE AND THEREBY USURP DISTRIBUTIVE POWER.

Respondent argues that we are incorrect in stating that a court may not legislate, since judicial applications of law unavoidably do just this. In reply, we repeat that a court may not legislate, and this follows from the differing natures of corrective and distributive power. We concede, however, that since laws are general and the specific situations to which they must be applied are infinite, the language of a law may create uncertainty as to whether it applies to a given set of facts or not. Accordingly, courts must often interpret statutory language. Moreover, when no written laws exist but various customs do, these may require interpretation in order to determine whether they bind given parties under various circumstances. The discretion courts exercise in these cases is what Respondent now claims to be an unavoidable judicial exercise of distributive, that is, legislative, power. This discretion is popularly called interpretation, although it is more anciently termed “equity,” as Aristotle noted:

Of [laws] that are unwritten, there are two kinds. One kind arises [from custom,] for instance, to be grateful to a benefactor, to render good for good, to help ones friends, and the like; the other kind contains what is omitted in the written law. For that which is equitable seems to be just, and *equity is justice that goes beyond the written law*. These omissions [in written laws] are sometimes involuntary, sometimes voluntary, on the part of the legislators; involuntary when it may have escaped their notice, voluntary when, being unable to define for all cases, they are obliged to make a universal statement, which is not applicable to all, but only to most cases; and whenever it is difficult to give a definition owing to the infinite number of cases, as for instance, the size and kind of an iron instrument used in wounding; for life would not be long enough to reckon all the possibilities. If then no exact definition is possible, but legislation is necessary, one must have recourse to general terms, so that, if a man wearing a ring lifts up his hand to strike or actually strikes, according to the written law he is guilty of a wrongdoing, but in reality he is not, and this is a case for equity...It is equitable to...look not to the law but to the legislator, not to the action itself, but to the moral purpose, not to the part but to the whole...⁷⁵

When courts do equity, that is, when they interpret a law or custom in order to apply it, they are in grave danger of committing injustice by legislating, usurping distributive power. It is obvious that a court may not make or change a law, for legislation is a distributive act and cannot justly be done by a court. When a court applies an old law to a novel case, however, it is impliedly writing new law, adding specific applications to the general statute, as if it were a legislature saying, ‘this law applies to these new situations as well.’

Moreover, the fact that a court must treat all similar cases similarly if it is to be

⁷⁵ Aristotle, *Rhetoric*, Book I, Chapter XIII from 1374a11. (Italics supplied).

logically consistent requires that it apply its new interpretation to all future cases of like circumstances. This, the doctrine of *Stare Decisis*, is the principle which makes specific court decisions become general laws of future application covering parties not before the court. Thus, the legislature's need to legislate general laws on the one hand, and court's need to interpret these laws in order to apply them on the other, combined with the rule of *Stare Decisis*, leads to a crisis wherein the separation of powers is often debauched.

It is easy to stipulate how a legislature must act in order to avoid exercising corrective justice. It must legislate in geometric proportion, and it may pass neither bills of attainder nor ex-post facto laws. A bill of attainder is a law so narrowly drawn that it directly names or, without naming, directly applies to a specific person or small group. An ex-post facto law applies retroactively, and therefore bears the mark of a court judgment. These are quintessentially corrective justice, and therefore, a legislature cannot be permitted to legislate by arithmetic proportion, pass bills of attainder, or enact ex-post facto laws, since by doing any of these it becomes a court. We note with dismay how far legislatures have gone in pursuing such corrective matters, although we do not believe that the entire constitution of France is simply a large bill of attainder, a whole constitution written for and about De Gaulle, as some have claimed.

On the other hand, it is hard to stipulate just how a court should interpret law without legislating. As we have noted, judicial determination requires applying a general law to a situation not expressly mentioned in that law, or a general custom to a new situation never before subject to the custom. In either case, the court's interpretation of the statute or custom threatens to be legislative, and it is difficult indeed to draw the line between interpretations which merely apply the law and those which are, in essence, writing new law. So, we agree with the Respondent that corrective justice has a distributive effect, or expressed differently, that adjudication has a legislative effect. Since this effect is unjust, the question thus becomes how to eliminate or at least minimize the legislative effect of corrective activity.

The gaps in a general law are called its interstices. One can think of the interstices as the holes in a lattice. It matters not whether it is a written law or a custom, either can have such gaps or interstices. In either case, this is where a court may, and must, interpret. When a general law is applied to specific facts for the first time, a court is essentially engaging not only in corrective justice, but also in interstitial legislation. Correct interstitial legislation requires honoring the intention of the law such that it may be accurately applied to specific facts. This is usually done by reference to the intent of the lawmaker. When this intent is ignored or violated, then the interpretive application is not an interpretation, but rather an alteration or amendment to the law. This a court cannot with justice do, for it will be legislating.

Let us therefore explore the subject of judicial interpretation carefully, in order to rid it of its legislative effects. Blackstone set forth the following basic principles of interpretation in his *Commentaries*:

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made...And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law...Words are generally to be understood in their usual and most

known signification;...if words happen to be still dubious, we may establish their meaning from context...thus...[a] preamble is often called in to help the construction of an act...As to the subject matter, we are always to be understood as having a regard thereto; for that is always foremost in the eye of the legislator, and all his expressions directed to that end...But lastly, the most universal and effectual way of discovering the true meaning of a law when the words are dubious is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.

This method of interpreting laws, by the reason of them, [is] what we call equity; which is thus defined by Grotius, ‘the correction of that wherein the law, by reason of its universality, is deficient.’⁷⁶ For since in laws all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which, had they been foreseen, the legislator would have excepted...And on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law, *which would make every judge a legislator*, and introduce most infinite confusion.⁷⁷

[Moreover,] it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated the power to pronounce a new law, but to maintain and expound the old one....[W]here the former determination is most evidently contrary to reason,...the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*.⁷⁸

The rules to be observed with regard to the construction of statutes are principally these which follow...[I]t is the business of the judges so to construe [an] act, as to suppress the mischief and advance the remedy...A statute which treats of things or persons of inferior rank, cannot by any *general words* be extended to those of a superior. Penal statutes must be

⁷⁶ Grotius, “*de aequitate*,” according to Blackstone.

⁷⁷ Blackstone, *Commentaries*, Vol. I, Introduction, § II. (Italics supplied).

⁷⁸ Blackstone, *Commentaries*, Vol. I, Introduction, § II. (Italics in the Original).

construed strictly...One part of a statute must be so construed by another, that the whole may if possible stand...Where the common law and a statute differ, the common law gives way to the statute; and an old statute gives way to a new one...If a statute that repeals another is itself repealed, the first statute is hereby revived...Acts of [the legislature] derogatory from the power of subsequent [legislatures] bind not...Lastly, acts...that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contrary to common reason, they are, with regard to those collateral consequences, void.⁷⁹

From these principles we can deduce the rough outlines of the art of judicial interpretation. Parenthetically, we must note, however, that construction is different from interpretation, strictly speaking. Construction is a term of wider scope than interpretation, since interpretation "...is concerned only with ascertaining the sense and meaning of the subject matter..." whereas, construction "...may also be directed at ascertaining the legal effects and consequences of written instruments..."⁸⁰ Nevertheless, when we digest the comments of Aristotle and Blackstone, we can see that a continuum emerges, with strict interpretation at one end and extravagant construction at the other. Strict interpretation is the unavoidable modicum of legislative action inherent in corrective justice. The further a court strays from such restrained application of the law, the more it indulges in a usurpation of legislative power.

It is no solution, however, to divest the court of this modicum of legislative power by having the court invite the legislature to provide specific instruction regarding a dubious matter. This was commonly called a rescript, and it results in the opposite injustice, since it requires a legislature to engage in a specific instance of corrective justice, contrary to their nature as a distributive body. It is no improvement of things to prevent judicial legislation by permitting the opposite injustice of legislative adjudication. Such is merely the exchange of one injustice for another.

It is also no solution to excuse the judiciary from the duty of abiding by the principle of *stare decisis*. Such a departure would indeed reduce the legislative effect of judicial acts. However, like cases must be treated alike if justice is to prevail, and the only exception to this is when the precedent is itself wrong or unjust; the prospective application of the old injustice cannot be tolerated. In such cases, the reasoning and conclusion of the former case must be abandoned as to the new, though the cases be identical. Otherwise, the principle of *stare decisis* must be followed as a matter of utmost importance, as it prevents the indeterminacy and inequity that result from like cases being treated variably.

So as between the two mischiefs, it is better to tolerate the minimized phenomenon of unaccountable judges making laws now and then than permit the biased legislator to judge the odd case. A judge's legislative error will usually proceed from ignorance rather than bias, since litigants can petition to remove biased judges during the case. Also, such mistakes can be fixed later by an offended legislature before they injure the general public. On the other hand, a legislator's wrongful judgment will almost certainly proceed from partisanship and majoritarian pressures, and it will be

⁷⁹ Blackstone, *Commentaries*, Vol. I, Introduction, § III.

⁸⁰ Black, *Black's Law Dictionary*, 5th Ed.

beyond the power of the courts to remedy, since revisiting the case would put the parties in double jeopardy, a yet more grievous injustice than the first.

THAT LEGISLATION AND ADJUDICATION ARE DISTINGUISHABLE AS OPPOSITES IN SEVERAL RESPECTS.

Respondent has claimed that our attempts to distinguish legislative from adjudicative acts are moot, since in many cases these two types of action are not clearly different and indeed sometimes appear nearly identical. We disagree, since even in cases of striking similarity they are clearly distinct as they contain opposite essences and therefore cannot possibly be the same thing. Legislation and adjudication differ spatially and temporally. Spatially, legislation applies to the whole, while adjudication applies to a part. Temporally, legislation applies to future acts while adjudication applies to past acts. Therefore, decisions which apply in the future to the whole are solidly legislative in nature, while decisions that apply to the past of a part of the whole are clearly adjudicative. Now, certainly the Respondent is correct that the definition of the whole can be manipulated so as to clothe adjudications in legislative costume, but such is trickery,⁸¹ and the manipulative parties will not be so easily able to redefine the past as to make it appear to be the future, or describe the future so as to deceive people into thinking it the past. Thus, temporal opposition is the clearest way to distinguish legislation from adjudication. We note that the Respondent's own constitution makes use of these two distinguishing factors, for it forbids the Congress from passing any bill of attainder or ex-post facto law. These forbidden 'laws' are in fact adjudications, being in the one case too narrow, and in the other, applicable to the past, precisely the two factors which distinguish adjudication from legislation.

Respondent complains, however, that while we first criticized Respondent for its failure to see the underlying ratios which define legislative and adjudicative action, we now abandon those distinctions and criticize them for failing to see a new, unrelated distinction between these powers, namely past or future applicability to whole or partial groups. Respondent asserts that it cannot be liable for failure to appreciate both, since as this court has already stated, there cannot be more than one true definition of a thing.

We agree that there cannot be more than one true definition of any thing, but we do not agree that we have suggested two rival methods of viewing legislation and adjudication. The spatial and temporal measures which we have just described are the natural and necessary consequences of the ratio formulae of distributive and corrective justice. They are not rival definitions, but obvious attributes arising from the application of geometric and arithmetic means respectively. By way of illustration, an

⁸¹ We note that Respondent has tried to limit this abuse by adopting the doctrine of suspect classifications, which prohibit certain groupings, especially racial, from being used as an object upon which a law may fall explicitly or implicitly. The doctrine is, nevertheless, too narrow and does not sufficiently guard against twisted definitions of the 'whole' upon which a law falls.

instance of corrective justice is impossible but upon known facts. It requires a comparison of existing circumstances. These cannot be matters of futurity, but must rather be things already past, lest they cease to be knowable and comparable. Thus, corrective justice applies by nature to past events and cannot conceivably apply to future events. On the contrary, distributive justice looks to the future result of a contemplated distribution in order to verify whether that future result will admit of geometric proportionality. Thus, distribution naturally involves an estimation of matters of futurity. With regard to the scope of an act, whether it falls upon the whole or a discrete part, these factors are also natural consequences of the operation of distributive and corrective justice. A correction cannot involve the whole, for corrections require two parties, one with an unwarranted surplus and the other a resulting deficit. The whole is a single party, and it cannot be said to be simultaneously in a state of surplus and deficit in regard to itself. Corrective justice, by nature, must therefore apply to parts of the whole and not to the whole itself. Correspondingly, distributive justice is by definition an enterprise which involves consideration of the proportionate effects of any distribution on the whole. For example, the law ‘all non-felons shall be able to vote’ involves the distribution of enfranchisement to a part of the whole, the non-felons, based on their merit compared to the felons, and together, these elements, felon and non-felon, comprise the whole. Thus, the distribution contemplates the whole and attempts to make a proportionate distribution in light of the true differences among parts of the whole. As we noted before, however, the definition of the whole can be manipulated by those desiring to manufacture a specific outcome, and hence this measure is of less evidentiary value than temporal characteristics like the prospective or retrospective nature of a decision.

THAT OTHER FORMULATIONS OF JUSTICE ARE OFTEN FLAWED, PARTICULARLY JUSTICE AS RECIPROCITY

Classical political theory divided justice, as we have seen, into distributive and corrective types, admitting of geometric and arithmetic proportions respectively. The importance of these distinctions cannot be overstated. They are implicit in every political idea and explicit in every rule of law and legal case. Justice has often been given other formulas, however, some of which must be refuted from the outset lest they annoy our reasoned discourses at some later stage.

A cardinal error of jurisprudence is the idea of justice as reciprocity. ‘An eye for an eye’ is reciprocal “justice.” It is well known that an eye for an eye eventually makes the whole world blind, and thus is reciprocity refuted in the daily conversations of the masses. But we must be more explicit in our refutation, for it is a broad principle we are jettisoning, one which holds sway over millions of persons around the world. Reciprocity is essentially retaliation, inflicting on one the harms he inflicted on others. This is often and mistakenly called corrective justice.

An examination reveals that simple reciprocity is antithetical to justice. It is clear that wrongdoing is, if truly wrongdoing, foul and evil. It is also clear that when a hammer strikes firmly or fast, the thing hammered is struck in the same way, the ef-

fect in the thing struck is the same as the hammer makes it.⁸² Likewise, if a thing is pulled, it will be moved, swiftly or minutely, according to the swift or gingerly action of the agency. This relationship obtains among all agents and subjects, the subject receiving an effect identical to the action of the agent. Now then, paying a penalty is to suffer something at the hands of an agent, a punisher, and he who punishes aright punishes justly. He who is penalized by just punishment therefore suffers what is just. This accords with the principle adduced above, namely, that subjects receive an identical effect to the action of the agent. Here, the penalized suffers justice when the punisher inflicts justice in the form of a just penalty. Moreover, what is just is fair, and by fair we mean not foul or bad, but rather good. Thus, the penalized suffers what is good, and this means he has been benefited and becomes accordingly better, being thus improved.

However, consider now the case where the wrongdoer commits a foul act, and the punisher administers an identical act, a foul act, as a punishment, as in the case of retribution. A criminal act is foul if it is injurious to the victim, harming him and making him worse. The punisher, inflicting this very act in retribution upon he who has previously committed it, is harming the punished, rendering him injured and worse off, which is to say that the punished suffers what is bad. He has therefore not suffered justice, for justice is by definition the good. He has suffered an injustice. The punished has suffered the bad. We must recall that a thing can never be its opposite, and justice cannot be unjust, and what is unjust is bad. Thus, justice cannot be bad, and inflicting the bad cannot, therefore, be just. Thus, it is clear that retribution is antithetical to justice, where the reciprocated act is foul.⁸³

THAT NO PENALTY SHOULD BE BETTER THAN REFRAINING FROM CRIME

Respondent objects that if just punishment improves the wrongdoer, then committing crime will be incentivized, as the wise wrongdoer would seek improvement in this manner. We agree in principle, but point out that there can be no net gain to the wrongdoer in such instances, for although the just penalty will improve them, the same improvement could always be achieved more easily and economically by avoiding crime. This is because penalties are exclusively dispensed by the state, under the administration of a bureaucracy, whereas the same lessons are taught to non-criminals by free-market institutions. Accordingly, the penalty will be taught with less efficiency and skill than the free-market lesson. It will take longer and require more effort on the part of the learner. Moreover, the time required to learn in prison impairs the wrongdoer's earnings and ability to manage his or her financial affairs during and potentially after incarceration. Therefore, the penalty is less economical than the lesson. Thus, just punishment always improves the wrongdoer, but not as quickly or

⁸² This argument is a synopsis of that in Plato's *Gorgias*, at 475 B. Some text has been copied verbatim and has not been placed into quotation marks, for ease of reading. The translation is by W.R.M. Lamb.

⁸³ Plato, *Gorgias*, from 476 B.

efficiently as the same information learned as a lesson in the free-market. Therefore, wrongdoing is not incentivized by the beneficial effects of just punishment.

THAT LAW AND JUSTICE ARE VASTLY DIFFERENT THINGS; A DISTINCTION WHICH UNDERLIES CIVIL DISOBEDIENCE

When people first contemplate justice, the usual error they make is to equate it with law. As we have seen, law and justice are vastly different. Speaking of lawful as if it were just is like speaking of tasty as if it were healthy. It may be so, but only coincidentally.

As children, we are told that it is wrong and unfair to break the rules, or, in so many words, that justice is obedience to the law. It is a convenient lie for children, one which allows adults to manipulate and educate them. But it is a lie which every human being must outgrow or they will be politically enslaved by it. A law can make anything illegal; no law can make something just or the reverse; no unjust thing can be made just by the alteration of the legal attitude toward it. The massacre of all green-eyed people is no more just after being made into a law than before. It is the same act, with the same moral character.

An illegal act and the same act legalized are morally identical except in one respect. They differ in that the performance of the illegal act entails civil disobedience. The moral difference between performing the unlawful action and same if lawful is the moral character of disobedience to the state *per-se*. There is no moral difference in the underlying act. The question is the justness of the state. To oppose a just state is to oppose justice, to an extent, and hence an injustice.

THAT LAW HAS EQUIVOCAL MEANINGS

As we deduced elsewhere, people are disposed to use the word law in equivocal senses, once as a descriptive principle and again as a normative principle.⁸⁴ We also noted that these meanings were, in fact, opposite in most respects and therefore laws usually could not be both normative and descriptive.⁸⁵ For the sake of continuity and to review the validity of those conclusions, let us revisit the logic which led us to them.

The operations of nature as they occur in perpetuity are styled laws, namely laws of nature. These laws describe relationships which always obtain in the physical world, despite the opinions and will of humanity. On the other hand, the rules governing society are also termed laws, but these principles of human interaction are fundamentally different, for they outline the manner *not* in which humans automatically act, but rather how they *should* act. They are normative, not descriptive. This puts them in opposition to the descriptive laws, as normative law applies to actions which do not happen automatically and must be compelled by the law's enactment, while the descriptive laws apply to things which inherently do happen automatically. Thus, the two can be seen as opposite. There is a sense in which these two rival meanings of law find unity, however, for each is a principle of order among subjects, the one natural and the other adopted by humans for themselves. This realization leads to

⁸⁴ *The Sophomoric Discourses*, Book V, Chapter IV, and Book VI, Chapter VII.

⁸⁵ At the same time and in the same way.

the ultimate definition of law, for law is the changelessness in anything. The respect in which anything is changeless is a law.

This opposition between normative and descriptive law was shown to have a tremendous impact on subsequent discussions of rights and duties since these are often founded on natural-law justifications and deemed natural, or ‘self-evident.’ But as we are clarifying the meaning of law, we will pass over the differences and similarities of rights and duties for the time being and focus more tightly on the definition of law, bearing in mind that law admits of both normative and descriptive senses.

THAT NATURAL LAW IS COMPREHENSIBLE ONLY AFTER DEFINING NATURE

Respondent objects to the mention of descriptive law in the context of this case, asserting that there is no political validity to natural or descriptive laws. Insofar as we attempt to characterize the Petitioner’s claims as based on natural law, Respondent insists that we dismiss them as based on no real law at all. Respondent goes so far as to say that there is no such thing as natural law; that it lacks of any clear definition, meaning different things to everyone, and that its predicative term ‘natural’ has so many meanings that the phrase is rendered unacceptably vague.

Respondent is correct that controversy exists surrounding the term ‘natural law.’ But the subject of natural law and its derivative fields of natural rights and equity need not occasion the confusion and rancor which has heretofore polluted American jurisprudence. The topic is easily understood and incorporated into the ideal system of justice when understood as coextensive with justice *per se*. This will present an intellectually uncomfortable position for Respondent, and hence we shall explain our reasoning regarding the meaning of ‘natural law’ in detail before advancing to an inquiry concerning what the natural law comprehends in all of its permutations.

THAT THROUGHOUT HISTORY, ‘UNNATURAL’ HAS MEANT DIVINE, MAN-MADE, AND EVEN NON-EXISTENT.

Natural law is unknowable apart from a firm understanding of the natural *per se*. Thus we must ask first what is natural if we are to come to terms with any idea of natural law. Natural has had essentially three meanings throughout history, namely, 1) not divine, 2) not man-made, and 3) not non-existent. This is to say that the divine, the manmade and the nonexistent are each referred to in a sense as unnatural. Consider the opposites of the natural. In its fullest sense, the opposite of the natural is the non-existent, as the idea of nature is logically coterminous with reality, or that which is. A second opposite of natural is the supernatural, and a third, the man-made, or the “artificial.” Let us consider each in turn, for by mistaken usage, we risk a long chain of error and confusion in our subsequent reasonings concerning natural law.

The natural as the real is the widest sense in which the term can be used. In this sense, nature is the ordering of the cosmos, imbued with meaning as that term is, for the cosmos is not merely the universe, but the ordered, meaningful universe, in which humans find themselves intrinsic and homogeneous, distinct but only as an harmonious part of the whole. This is an ancient perspective, one which was discarded by the

moderns, beginning with Descartes' duality of man against nature,⁸⁶ only to be accidentally and embarrassingly revived by Darwin's conclusion that we arose incrementally from nature.⁸⁷ Darwin's formulation admits of the idea that man is natural, but it can be, and has been, read to imply that in being from nature we are not there now. The inference that man is natural shines forth to thwart the existentialist who later, in taking his cue from the *physicists*, posited man as an absurdity, a spasm of free will existing apart from a meaningless universe.⁸⁸

In the existentialist thesis we see the second meaning of nature, namely, that nature is that which is neither man nor man-made. It is visually compelling to see the man-made as unnatural in a world clotted with artifacts, paved over, built up, and illuminated by the glow of electric light; the city indeed confronts us experientially as the ultimate artifact, the quintessentially artificial. But it is less the empirical objects of our contemplation which render the man-made world seemingly unnatural than the scientific framework through which we view it, for science posits the world as meaningless *ab initio*, in order to undertake an objective analysis of description, not of meaning. Nature viewed thus has no meaning but only system. It is the nagging protest of human life that the world is, despite what scientists say, meaningful, that life is meaningful, that "I am meaningful."⁸⁹ It is this apparent contradiction between the experientially meaningful self and the scientifically meaningless world that refutes the notion that man is not natural.

This thesis was taken even further during the extreme moments of *modern* thought. Scientists, in their joy over the adoption of their perspective as a world view, responded by further proclaiming that not only was man unnatural, but that humans were really not human at all, but merely atoms and molecules, their behaviors those of billiard balls, not moral subjects in a meaningful world.⁹⁰ This was set forth by Watson and the behaviorists, who went so far as to say that the idea of consciousness itself was a useless leftover from an age of superstition and magic.⁹¹ Though we wonder whether Watson was conscious when writing that line, we must marvel at the willingness of the world to adopt his theses so rapidly. Watson's denial of the human aspects of humanity almost comes full circle to a view of humanity once again in harmony with nature, this time, the mechanical and meaningless type of nature in which Watson believed.

The third notion of the natural, as the opposite of the supernatural, arose from the grip of Christianity upon the western mind during the middle ages. Under this meaning, the natural world, being created by the divine, is other than the divine. As ecclesiastical thought dominated and suffocated the progress of rational thought following the fall of the western Roman Empire, the church was able to establish an

⁸⁶ This stems from Descartes' cleavage of natural entities into those with or without souls, man having such but not animals, which implies that the soul-less may be morally ignored and even exploited. See Descartes, *Letter to Regius*, May, 1641, also *Letter to Renier for Pollot*, April or May 1638, and Descartes' discourse on method, as found in *The Philosophical Writings of Descartes*, 1139-40.

⁸⁷ Darwin, *The Origin of Species*, Chapters XI and XV.

⁸⁸ Sartre, *Being and Nothingness*, Heidegger, *Sein und Zeit*. But see Kohák, *The Embers and the Stars*, Chapter II, 'The Gift of the Moral Law'.

⁸⁹ See Generally, Kohák, *The Embers and the Stars*, Chapter II.

⁹⁰ See Generally, Kohák, *The Embers and the Stars*, Chapter II.

⁹¹ Watson, *Behaviorism*, Chapter I.

intellectual regime which viewed the world as place to which man was banished, the land after Eden, the crucible from which man might aspire to escape into heaven. Thus heaven and earth were, respectively, the supernatural and the natural. The story of Christ emphasizes the distinction, the earth being a place so non-divine that to commingle with it God became incarnate in Jesus Christ.⁹²

The term natural in this sense is not seen in Augustine, though he would articulate essentially the same principle in distinguishing between a city of God and a city of man.⁹³ The idea of nature's distinctness from the supernatural wafts about St. Thomas' works as well, in that his project was to enunciate the harmony and interdependence of these otherly realms. Aquinas' terminology did not employ the word 'natural' in such a strictly non-divine sense for the very reason that he was trying to reestablish the idea of a broad meaning of the natural, consonant with and derivative of the divine.⁹⁴ But his purpose assumes that such was not the understanding of 'natural' common to his times, but rather that natural was popularly believed to be the opposite of supernatural. The explicit opposition of natural and supernatural was voiced by the Averroists, especially William of Occam.⁹⁵ Admittedly, this is a sense in which the term is not used currently. The term supernatural has now come close to meaning unholy, even satanic, the acts of evil incarnate, no longer even indicative of immateriality.

THAT WHEN DISCUSSING NATURAL LAW, 'NATURAL' MEANS NON-ARTIFICIAL, OR NOT MAN-MADE

Now then, which meaning of natural is used in the expression natural law? If the natural is meant to indicate the totality of the cosmos, then all law is natural law, as the artificial laws of man would be as natural as the laws of nature. Since this sense of the term renders the predicate irrelevant, let us conclude that in the term natural law, the natural does not mean the totality of the cosmos including man and his acts.

Next, we must decide if 'natural' in the term 'natural law' means the opposite of the supernatural. This is to ask whether the natural law is opposite of divine law, or if natural implies the not divine. Here, the ecclesiastical thinkers and the philosophers might agree that such is not the case, albeit for different reasons. Christian theologians would hold that the natural law is related to, proceeds from, or is a component of, the divine law, thus making opposition of the natural and supernatural law a wrong and heretical notion. In the eyes of the Philosophers, the contention that God's justice is absolutely just forces the same conclusion, given an omniscient God. But assuming that God's justice is but an opinion of justice compels perhaps a different conclusion, as we briefly investigated before. This indicates that the word 'nature' in natural law likely does not mean the opposite of supernatural.

We are left with the notion of the natural law as the alternative to the artificial or man-made law. It is this sense in which the term natural law is most intelligible. Let

⁹² *Matthew* 1:18; *Luke* 1:26-38; *Romans* 1:3-4; *John* 1:1-18, *Acts* 28:31; *Revelations* 3:7; *Hebrews* 1:10-12.

⁹³ St. Augustine, *City of God*, Book XI, especially Chapter XXXIII.

⁹⁴ St. Thomas Aquinas, *Summa Theologica*, I-II Question 91.

⁹⁵ Kohák, *The Embers and the Stars*, Chapter I.

us discuss, then, what is meant by a law which stands in contradistinction to the artificial or man-made law. First, it may seem that the phrase natural law is already a contradiction in terms under such definitions of nature and law. This follows from the understanding of law as an artifact of human origin and the natural as something not of human origin. This apparent contradiction obviously stems from the narrow definition of law, here painted in positivist colors. However, we shall see how law cannot logically be confined to the set of rules made by humans, and thus there is no inherent contradiction in the term natural law.

Respondent objects that we are being inconsistent with our pronouncements elsewhere on the topic of natural law, and that we must be bound to our former decisions on this subject. In specific, respondent cites our *Sophomoric Discourses*, wherein we stated that "...there are no such things as natural rights and duties."⁹⁶ We no longer believe that our opinion was correct in that particular, and we therefore overturn our previous judgment regarding natural rights. We also warn the Respondent not to conclude from our liberal references to the *Sophomoric Discourses* that we believe everything written therein.

In conclusion, natural law must be understood to mean the changelessness inherent in the physical world. All descriptions of tangible changelessness are natural laws. In those places where the occurrence of sentient willpower renders the changeless changeable, then attempts to re-impose or restore changelessness constitute man-made law.

⁹⁶ *The Sophomoric Discourses*, Book VI, Chapter VII.

PART II: JUSTICE IN PRACTICE

SECTION I: THE CONTEXT OF JUSTICE

THAT JUSTICE REQUIRES THE SUPERVENTION OF PEACE

Respondent claims that we have merely painted pictures in the sky thus far, and they insist that their real-world system of justice remains un-impeached. They claim that we cannot rightly criticize their system unless we describe an alternative system of our own, a better system.

We agree. It is unjust for us to criticize them in theory without demonstrating by actual example a better system of government. The United States has labored for centuries to evolve and refine its system of justice, it is proud of that system, and unless a better system is suggested, we agree that there is no way we can conclude that theirs is not the most just system possible. Without a showing that a better system or various specific improvements are actually possible, there is no reason why petitioner should prevail in this case. Accordingly, we will now take up this task and describe a system superior to Respondent's, since we believe that a better system does exist. There are several guiding principles we will use to describe such a system.

First, such a system must be able to exist. A country unable even to exist is obviously unable to provide justice or anything else for its people. Therefore, first step in designing an ideally just nation is insuring that it is capable of self-preservation. It must be durable enough to survive the pressures of both international competition and domestic infighting. This means the ideally just state must wield a certain degree of international power. When international power and conditions are understood, national structures can be designed to withstand them, creating peace; and during this peace, domestic justice and stability can be cultivated. Thus, justice in practice requires, as a threshold matter, national military and political strength sufficient to create and maintain peace.

So justice requires peace. Without political stability and military strength, there can be no peace, no freedom from war, and hence no justice but that which obtains at the pleasure of rival states, which is not justice but charity. And any nation dependent upon others for the enjoyment of its basic rights and freedoms operates upon a fantastic and fatal assessment of human nature and the conduct of states. Without strength, there can be no peace; and without peace there can be no justice. Now all that remains is to design the structures of government such that they first afford such peace and then provide maximal justice without endangering it.

These structures are constitutions, and to be durable they must have many attributes, and we will discuss them all. But the one overriding necessity is that they conform to the dictates of human nature. Otherwise, they will completely fail. Human nature is an absolute which if ignored, will doom any political structure. On the other hand, if human nature is heeded, it provides fantastic power and success to a constitu-

tion. So human nature must be fully respected and utilized for a constitution to be successful.

Human beings are insatiably selfish and competitive, in keeping with the nature of all living things. And this is not bad. It is a political blessing. It means that human nature is an active and passionate thing, full of energy and enterprise. It therefore makes for excellent systems of political power and, if channeled correctly, political balance and stability. Infinite selfishness can only be counterbalanced by other, equally infinite selfishness. The result is balanced competition. Thus, constitutions which place human selfishness in mutual counter-balance will be the most powerful and successful. They will contain potentially infinite power in perfect balance. If powerful, they will be able to secure peace and then refine their systems so as to provide maximum justice.

THAT JUSTICE CAN BE HAD THROUGH WAR BECAUSE WAR CAN BE A MEANS TO PEACE

Respondent asserts that we have contradicted ourselves, since we claim that justice requires peace and yet it can sometimes only be had through war. How, then, can justice require these seemingly opposite conditions, war and peace? In clarification, it is because limited war can lead to a just peace, although not all peace is just. As we noted earlier, peace is only to be valued when accompanied by justice.⁹⁷ Grotius explained that, "War...is undertaken in order to secure peace...War itself will finally conduct us to peace as its ultimate goal."⁹⁸ If and when it does so, and if the peace is a just one, war is alike a means to justice. This relationship is critical, and we will examine it in detail when we look at the military element of justice. The military method of obtaining justice is no less important to the topic than the structure of courts and the analysis of rival legal doctrines, though few see this critical point. Let us here note merely that war can create the peace upon which justice depends. This is not to say that peace without more always creates justice. Peace merely affords the only possibility of justice. Once peace is established, justice may be cultivated in society and kindled by the daily frictions of people.

This point must be taken one step further, however, owing to the advent of nuclear weapons and other weapons of mass destruction. Justice obviously requires life, which now requires peace, or at the very least, some drastic limitations on war. Life on Earth as we know it now depends on finding a structure capable of producing international peace, for general warfare can now destroy the planet's inhabitants in a few hours. Obviously, there can be no justice in such a situation. In this ultimate sense, justice requires peace, now more urgently than ever before. To re-quote MacArthur:

...The utter destructiveness of war...now has rendered it useless as a means of settling international disputes. We have had our last chance. If we will not devise some greater and more equitable system, our Armageddon will be at our door.⁹⁹

⁹⁷ Sydney, *Discourses Concerning Government*, Part I, Section XV.

⁹⁸ Grotius, *De Jure Belli et Pacis Libri Tres*, Book I, Chapter I, Section I.

⁹⁹ MacArthur, *Farewell Speech to Congress*, April 19, 1951.

It is just such a 'greater and more equitable system' that we are about to describe. The establishment of justice requires identifying a political system which creates as a threshold matter, international peace. Then it must also yield domestic justice.

THAT WE MUST INVESTIGATE HOW PEACE AND LIBERTY ARE INTERNATIONALLY MAINTAINED IN ORDER TO UN- DERSTAND WHAT METHODS CONDUCE TO DOMESTIC JUSTICE

Respondent protests our investigation of international matters like war and international relations, alleging that they are irrelevant to the issue of this case, namely the justice or injustice of its domestic institutions. Respondent further asserts that domestic peace is the result of peaceful cultures and benevolent ideologies, and thus we ought not blame Respondent's governmental structures for any lack of peace. Strife, says Respondent, is the result of the people's personality, not the shape of the government. Since we find Respondent's assertions to be gravely in error, we will explain in detail why we believe that international matters bear very heavily upon domestic justice, and that as for peace, governmental structure is everything, and popular ideology next to nothing.

The potential justice of domestic institutions requires the supervision of international peace, and this comes from the excellency of these very domestic political structures. International peace has little to do with prevailing ideologies. It is a question of structure, not ideology. Lasting international peace requires domestic political offices which by their very architecture achieve strength, balance, and stability, in spite of whatever ideology prevails. Such offices cannot be designed, however, without an adequate understanding of the nature of the beings who will occupy them, for all constitutions fail when in conflict with human nature. Human nature remains forever a constant, and upon its immutable and constant principles, and not upon ephemeral ideologies, political structures can be designed which by their very architecture achieve international peace.

Thus we say that ideologies are largely irrelevant to international peace; that human nature and the structure of political institutions are ultimately what matter. International stability cannot result from mere ideologies which attempt to enhance the kindness and humane characteristics of mankind, even those which operate successfully upon an otherwise malicious dictator here, a once invidious demagogue there. Place a weak state beside a strong one, and sooner or later instability results, a little sooner or later as ideological happenstance determines, but inevitably nevertheless. Intentions are ultimately irrelevant; actual capabilities are finally the determining factor. Peace-loving peoples can be brought into violent upheaval as readily as can vicious hordes be constrained to peacefulness, all by the design of political arrangements. The predispositions of human nature will, over the long term, render irrelevant the various personalities, inclinations, ideologies and idiosyncrasies of leaders and peoples. Thus, the enduring and reliable formulae for peace all depend upon finding the political structure which achieves stability and balance in accordance with human nature. Ideologies may temporarily avert political instability, but over the long term they do nothing, for they cannot alter human nature.

We must therefore investigate the nature of the beings who will populate the political structures, that we may craft the offices accordingly and ultimately derive a stable system of justice, whatever ideology prevails. We ask the Respondent's indulgence as we describe this system in detail.

THAT HUMAN NATURE IS SUCH THAT WE MUST ASSUME PEOPLE TO BE PERPETUALLY INCLINED TO PRIDE, SELFISHNESS AND GREED.

Respondent cautions that nobody is perfect and warns us that if we posit an ideal government assuming otherwise, then it will not really be possible and will not prove the inadequacy of their system. We agree. We are not inquiring about an ideal government for saints, but rather for sinners. Philosophers may argue forever whether mankind is inherently good or bad. But for the purposes of political theory we are forced to assume, whatever be the truth, that people are perpetually inclined to excessive selfishness. As Machiavelli noted:

All those who have written upon civil institutions demonstrate (and history is full of examples to support them) that whoever desires to found a state and give it laws, must start with assuming that all men are bad and ever ready to display their vicious nature, whenever they find occasion for it...[M]en act rightly only upon compulsion; but from the moment that they have the option and liberty to commit wrong with impunity, then they never fail to carry confusion and disorder everywhere...¹⁰⁰ For it may be said of men in general that they are ungrateful, voluble, dissemblers, anxious to avoid danger, and covetous of gain...[and] men do not believe themselves sure of what they already possess except by acquiring still more...¹⁰¹ Nature has created men so that they desire everything, but are unable to attain it; desire being thus always greater than the faculty of acquiring, discontent with what they have and dissatisfaction with themselves result from it; for as some men desire to have more, whilst others fear to lose what they have, enmities and war are the consequences...¹⁰² [Their] love is held by a chain of obligation which, men being selfish, is broken whenever it serves their purpose...¹⁰³

All men [in all ages] are born and live and die in the same way, and therefore resemble each other...¹⁰⁴ Men accustomed to live after one fashion do not like to change, and the less so as they do not see the evil staring them in the face, but presented to them as mere conjecture...¹⁰⁵ For the great majority of mankind are satisfied with appearances, as

¹⁰⁰ Machiavelli, *Discourses*, Book I, Chapter IV.

¹⁰¹ Machiavelli, *Discourses*, Book I, Chapter V.

¹⁰² Machiavelli, *Discourses*, Book I, Chapter XXXVII.

¹⁰³ Machiavelli, *The Prince*, Chapter XVII.

¹⁰⁴ Machiavelli, *Discourses*, Book I, Chapter XI.

¹⁰⁵ Machiavelli, *Discourses*, Book I, Chapter XVIII.

though they were realities, and are often even more influenced by the things that seem than by those that are...¹⁰⁶ We should notice...how easily men are corrupted and become wicked, although originally good and well educated...All this, if carefully studied by the legislators of republics...will make them more prompt in restraining the passions of men and depriving them of all hopes of being able to do wrong with impunity.¹⁰⁷

We must therefore take into account man's rapaciousness and infidelity as we outline the ideal system of justice, and we shall see that this human frailty is actually a blessing for liberty, for mankind's moral shortcomings provide the certainty necessary to a durable political structure. Mankind is constant in its errors and haphazard in its successes. Humanity is reliably fallible, not reliably perfect. Thus, an reliable system of justice can only proceed upon the assumption that humanity is ever prone to blunder and perpetually inclined to execute the darkest designs that pride, arrogance and greed can suggest. In this way, humanity's shortcomings will not doom the political structure, and munificence will be so much of an added bonus to the justice of the whole.

Political theory must be practical, and so must a justice system, if there is to be justice. Human nature's deficiencies cause many otherwise ideal constitutions to break down, as we shall see. Thus, we must inquire as to the constitutional format which, given mankind's confessed imperfections, can nevertheless provide the optimal basis for justice.

THAT THE SELFISHNESS OF HUMANITY IS THE KEY TO STABILITY AND EFFICIENCY OF ALL PUBLIC LIFE, INCLUDING COMMERCIAL MARKETS, LAW COURTS, LEGISLATURES, AND EXECUTIVES.

The only way to contain unlimited forces is to oppose them with other unlimited forces. The selfishness of humanity is such an unlimited force. Although humanity never willingly errs,¹⁰⁸ people are intrinsically self-interested, attempting at all times to maximize what they perceive as their own existence, according to an imperfect conception thereof. This principle of human nature must be fully digested if justice is to be attained. It is no coincidence that the most durable and just nations of the Earth have each candidly accepted this ambitious, vindictive and rapacious side of mankind and put it to excellent use, such that the tumultuous intercourse of the masses produced profound strength, stability and efficiency. It is natural for people to apprehend danger from these tumults, but when such are viewed in their collective effect, they form the sturdiest and most reliable building blocks of government and society. It is for this reason that Machiavelli declared that the quarrels between the Senate and

¹⁰⁶ Machiavelli, *Discourses*, Book I, Chapter XXV.

¹⁰⁷ Machiavelli, *Discourses*, Book I, Chapter XLII.

¹⁰⁸ Nobody wishes to do evil, but many do evil thinking it to be somehow good. For the proof, see Plato's *Protagoras*, at 358 C-D, and *Gorgias*, at 467 C-468 C and 500 A.

people of Rome were the origin of her liberty.¹⁰⁹ Ambition against ambition is the principle whereby individual self-interests and egoisms counter-balance one another, producing the common good of all. In economics, this common good is called the market equilibrium price; in politics, it is called the doctrine of checks and balances; in law, it is called the adversarial system. Though the doctrine of ambition against ambition makes its appearance in myriad fields, each making an exclusive claim to it, it is actually common to all political fields, including economics, and it obtains the maximum good wherever it is employed. The only way to contain unlimited forces is to oppose them with other unlimited forces. The result is balance, and in the political context, justice.

THAT THERE ARE TWO ALTERNATIVE MODELS OF INTERNATIONAL PEACE: HEGEMONY AND THE BALANCE OF POWERS.

There are two international conditions under which peace prevails; one in which a single peace-loving nation comes to unshakable predominance over all others, and one in which all nations are balanced against one another such that none can predominate. The first of these, called hegemony, is dangerous. Benevolent nations are rare, and power tends to corrupt any nation when it approaches or attains hegemony. On the other hand, the balance-of-power system is also flawed, for not only is it marked by intermittent violence, but some members of the balance might not be just states at all. The unfortunate middle ground between these extremes entails war among unevenly matched powers. Since the state of war cannot be our goal if we are aiming at any system of domestic justice, though it could be the means, let us look at the alternative structures for international peace, the hegemonic and the balance of powers models, in order to decide which is most conducive to an ideal system of justice. In this, we are coincidentally looking for the ideal system of international peace.

THAT THE BALANCE OF POWER MODEL WAS ABLE TO PRODUCE A ROUGH CONDITION OF INTERNATIONAL PEACE, BUT ONLY THROUGH CONSTANT AND UNCERTAIN SKIRMISHES

Groups of nations, when cast into mutual competition, invariably suffer one of two fates. Either the weaker states will be gradually subdued by the most powerful, which becomes thereby hegemonic, or a stalemate will emerge wherein no state can predominate, leaving a balance of powers. When such a balance eliminates the ability of nations to dominate one another, it naturally contracts the scope and severity of their conflicts, each being loathe to commit energies to an unpropitious contest. Stability is thus achieved not by the satisfaction of every member's objectives, but rather by mutual competition resulting in multilateral concessions and grudging cooperation. Thus, the balance of powers model of international peace is most properly understood

¹⁰⁹ Machiavelli, *The Discourses*, Book I, Chapter IV.

as a mechanism for maintaining global stability through micro-conflict, operating when there arise several nations of approximately equal strength which act together in thwarting the pretensions of the most aggressive of their number. Kissinger describes this process thoroughly in his treatise, *Diplomacy*, wherein he adduces five epochs during which a balance of powers supervened, namely, the city-states era of ancient Greece; the warring states period of ancient China; Renaissance Italy; the European states following the Peace of Westphalia in 1648 and these same states during the Metternich system after the Congress of Vienna in 1815.¹¹⁰

In each of the five cases, this balance operated for a period of time to produce a geopolitical stability, which although punctuated by minor, periodic conflicts, kept each nation roughly free and independent. Such balances ultimately collapse, however, either when one power becomes strong enough to overcome the combined opposition of the rest, or the group becomes bifurcated into two competing factions which mutually destroy one another. The former occurrence can be seen in Macedonia's rapid conquest of the Greek city-states.¹¹¹ The latter is exemplified by the tragic implosion of Greek civilization during the Peloponnesian war. As both events transpired among the same powers, in a common age of antiquity and upon the same fields, they serve as an especially useful example of the operation and decline of a balance of power system.

For the sake of understanding, let us consider how the Greek balance of powers arose. The geography of the Aegean is naturally suited to a parallel development of separated societies, owing to the divided nature of the land and an easy communication by sea. In the north, mountains cut and separate the river and coastal plains into isolated havens, each the cradle of a distinct city-state, such as Athens, Thebes, and Pella. In the south, the Peloponnesian peninsula separates the mainland powers from the Peninsular city-states of Corinth, Argos, Messena, and Sparta. Moreover, islands, at once too remote for subjugation and too proximate to ignore, like Rhodes, Lesbos, Minoan Crete, Sicily, Corcyra and Cyprus, housed additional powers. These diverse city-states were linked by the grateful waters of the Aegean and western Mediterranean, affording an intercourse productive at once of mutual familiarity, national interdependence, and headstrong rivalry.

These states thus arose, arguably, in rough balance, each abutting and contending with the other, and accepting mutual allegiance only when threatened by one or more of their own number or confronted with an outside power capable of eclipsing the combined force of them all. The reflexive instinct of the Greek states to form alliances arose from Sparta's constant testing and oversetting the Aegean power balance, and by the periodic contests with Persian power from the east. This latter unpleasantness occurred often, however, in such memorable instances as the invasions of Darius and Xerxes, and of course, the Trojan War.¹¹² Although the Greek balance of powers era was a cradle of philosophy and the humanities, it was a furious crucible of ambition and strife. The contenders for supremacy sparred incessantly, the weak groping for allies, the strong provoking confederations of enemies wherever they turned. Mat-

¹¹⁰ Kissinger, *Diplomacy*, Chapter I. There have been many other such periods.

¹¹¹ By Philip and Alexander the Great, as will be detailed later.

¹¹² The Trojan war was not, strictly speaking, a Persian conflict, but merely an Eastern one. These events occurred during the following approximate years: the Siege of Troy: 1193-1184 B.C., Darius's Invasions of Greece, 499-480 B.C., The invasion of Xerxes, 480 B.C.

ters came to a head when two groups of allies came to blows in what became known as the Peloponnesian war. The tragic result was the implosion of Greek civilization, after which the once powerful Greek confederations were little more than doormats for the Alexander's the Great's Macedonian army, and a century and a half later, the Romans.

As the Greek episodes show, the balance of power model of international peace is essentially turbulent. It is awkward to assess and odious to maintain. In a world of ever-shifting strengths and ever-changing relationships among states, determining whether a balance even exists is an exercise fraught with speculation and error. Moreover, enforcing such a balance, or remedying its growing defects, is violent and expensive. As Kissinger reminds:

In theory, of course, the balance of power should be quite calculable; in practice, it has proved extremely difficult to work out realistically. Even more complicated is harmonizing one's calculations with those of other states, which is the precondition for the operation of a balance of power. Consensus on the nature of the equilibrium is usually established by periodic conflict.¹¹³

A balance of powers operates only if the actors are rational and the balance is genuinely believed to exist. Irrational leaders will never be deterred by a balance of power. Rational leaders will need to test it constantly by threats and raids in order to verify whether it exists or not. Thus, even a healthy balance of powers in which every nation behaves rationally will be attended with endless spasms and violent shocks, without which the balance of power would not be credible and hence would deter nothing. Consequently, the balance of power model of international peace, while establishing a rough peace among nations, is essentially strife-prone and tedious for the nations involved.

Respondent objects that we have been hopelessly Eurocentric in our analysis of these matters, relying perpetually on Greek, Roman, and other European systems and examples. Respondent insists that if we were to consider the rest of the world, we would not find the balance of powers model instable or strife prone. We disagree, for we could chose any region of the world and draw the same conclusion.

For example, we could have taken the Korean peninsula, where in the fourth, fifth and sixth centuries, a balance of power system supervened. The independent kingdom of Silla in the southeast, abutted Kaya in the south, Paekche to the west, and Koguryo in the north. Chinese political disunity at the time allowed these kingdoms to fight one another for regional dominance. First Paekche, under King Kun Cho-go, seized an important slice of Koguryo lands in the Pyongyang area, establishing regional dominance. Koguryo answered by allying with Silla, in classic balance-of-powers politics. Koguryo thereby returned to ascendancy and ultimately, under King Kwanggaet'o, conquered vast regions of southern Manchuria and a significant part of the Paekche territory. Paekche, thus weakened, allied with Silla and cooperated with Kaya. The triple-alliance restrained Koguryo, which concentrated on humbling Paekche. Predictably, Silla became the strongest of the three allies, and began its own bid for complete domination. Under King Chinhung, Silla allied with Paekche and seized

¹¹³ Kissinger, *Diplomacy*, Chapter III.

the valuable Koguryo lands near Seoul. Then, Silla betrayed Paekche and annexed various Paekche lands. With this power base, Silla easily overcame Kaya, emerging as the dominant power in the peninsula. Thereafter, Koguryo and Paekche once again allied to protect themselves. Koguryo, being obliged to fend off not only Silla's thrusts, but also those of the Sui Empire in China, sought help even from the distant Wa peoples of Japan and the T'u-chueh Turks from the steppes of north-central Asia.¹¹⁴ This is a perfect example of the balance of powers in operation. The strong provoke alliances among the weak, experience defeat, and the newly strongest provokes a counter-alliance among the remaining former allies and recently defeated foe. We chose not to use this example merely because it is less well known to the parties of this case, to whom we owe our principle duty.

THAT THE HEGEMONIC MODEL PRODUCED INTERNATIONAL PEACE AND LIBERTY ONLY WHEN THE HEGEMON WAS ITSELF POLITICALLY STABLE AND CLASSICALLY LIBERAL

The alternative to a balance of powers system is a hegemonic order, where a single nation indisputably dominates all others. Hegemony is a word stained with blood, pronounced by tyrants with eyes ablaze, heard by the people with shuddering hearts. It is likewise an ideal prayed for by saints, pined for by philosophers, dreamt of by all who love peace. It is equally the most perilous and most promising formula, a path to both lasting stability and everlasting catastrophe. It is hard on the ears to hear this word uttered in tones of approbation, and yet there is no escaping the fact that it is the only formula wherein absolute peace has any chance at all. Balanced powers spar in order to test the balance, unbalanced powers war endlessly. Only in hegemony is there a complete and permanent cessation of hostilities. Yet, if a hegemon is corrupt, the new tranquility will merely become a long night of hopelessness and misery. The hegemonic model produces international liberty and independence only when the hegemonic power is itself politically stable and classically liberal, free from the tendencies towards tyranny which infect most nations and reside in the bowels of human nature itself.

It has oft been remarked that states can be likened to individuals, that groups of nations can be seen to behave like groups of persons. While true and useful to a point, this analogy is manifestly disproved by the potential among states for hegemony. States can be reduced to one. Persons cannot. A human being cannot subsist without the cooperation of others, but a state can. We may note this difference parenthetically, for it proves that at least some actions may be safely undertaken by states when the same action would be self-destructive for an individual. It would be absurd to contemplate the reduction of humanity to a single individual in order to secure peace. Questions surrounding the reduction of governments to a single monolith, however, must be taken seriously. Hegemony will certainly eliminate hostilities, but the regime thereby established may be the bane of human existence for millennia.

This forces us to conclude that the path to absolute peace is not the road to reli-

¹¹⁴ Eckert et. al. *Korea Old And New*, Chapter III.

able peace, and that a hegemonic order is not mankind's best hope for justice, although it may remain his best dream of it. Far better to entrust the fate of mankind to a turbulent peace than attempt an absolute peace which will more likely result in permanent slavery. This accords with the paradigm of justice as a result of competition among adversaries, as implicit in capitalism, political checks and balances, and the adversarial model of adjudication. Admitting finally that peace can be reliably maintained only by some kind of balance of powers, an equality of plural sovereignties, we must inquire into the ideal structure of such a nation among nations. This leads us to our next topic, namely constitutional formats.

THAT COLLECTIVE SECURITY IS AN UNWORKABLE SYSTEM OF INTERNATIONAL PEACE

Respondent demands that before we discuss constitutions we must first abandon our exclusive distinction between two forms of international peace, on the ground that it is false and unfair. Respondent points out that it has not yet attained either hegemony or a balance of power because of the extreme nature of each, and that it would be unfair for an unavoidable circumstance to throw them into an unjust light and thereby make Petitioner's victory automatic. In support of this defense, Respondent alleges that there is indeed an alternative to either hegemony on the one hand or balance of powers on the other, for a universal "collective security" agreement can also result in a lasting and reliable peace. In this we believe the Respondent is grievously mistaken, as theory and history have proved.

Collective security was advanced by Woodrow Wilson as a new model for international peace following the disaster of the First World War. Collective security is a system in which every member agrees to oppose jointly the warlike acts of any other member. Kissinger describes this system as follows:

Collective security defines no particular threat, guarantees no individual nation, and discriminates against none. It is theoretically designed to resist any threat to the peace, by whoever might pose it and against whomever it might be directed. [Whereas] alliances always presume a specific potential adversary; collective security defends international law in the abstract, which it seeks to sustain in much the same way that a judicial system upholds a domestic criminal code. It no more assumes a particular culprit than does domestic law...The [trigger] of collective security is the violation of the principle of 'peaceful' settlement of disputes in which all the peoples of the world are assumed to have a common interest.¹¹⁵

The fatal flaw of this seemingly ideal system is that nations never have identical interests in opposing specific warlike acts and never share an identical willingness to

¹¹⁵ Kissinger, *Diplomacy*, Chapter X.

run the risks which opposition requires.¹¹⁶ Nations invariably react differently to specific threats or acts of violence; a threat will unsettle each state to a degree inversely proportionate to its resistive ability. The ability to resist a threat is increased by a nation's size, economic might, military readiness, and geographical remoteness from the threat. Moreover, the intellectual outlook of one nation can render a real threat seemingly innocuous, while another state may see the trouble for what it is. Thus, single acts invariably threaten various nations to differing degrees. Kissinger concludes correctly that:

In the end, collective security [falls] prey to the weakness of its central premise—that all nations have the same interest in resisting a particular act of aggression and are prepared to run identical risks in opposing it. Experience has shown these assumptions to be false. No act of aggression involving a major power has ever been defeated by applying the principle of collective security. Either the world community has refused to assess the act as one which constituted aggression, or it has disagreed over the appropriate sanctions. And when sanctions were applied, they inevitably reflected the lowest common denominator, often proving so ineffectual that they did more harm than good.¹¹⁷

Thus, there are truly two alternatives for establishing international peace: hegemony or a balance of powers. Collective security is neither a rational nor practicable alternative to either. Collective security is a poisonous recipe for indecision and procrastination. It occasions divisions and disputes among members, whose bickering eventually tends to ratify the very breaches of peace they originally sought to prevent. With this said, we will continue on to our next subject, namely the constitutional structure with best affords justice.

¹¹⁶ Kissinger, *Diplomacy*, Chapter X.

¹¹⁷ Kissinger, *Diplomacy*, Chapter X.

SECTION II: CONSTITUTIONAL JUSTICE

THAT INVESTIGATING THE IDEAL JUSTICE SYSTEM RE- QUIRES A PRIOR EXAMINATION OF GOVERNMENTAL FORMATS, FOR UNSTABLE, CORRUPT OR TYRANNICAL GOVERNMENTS AFFORD BUT LITTLE JUSTICE

Our exploration of the ideal justice system requires that we next examine the nature of governments themselves, for unstable or tyrannical governments afford little justice; their courts and procedures are mere conduits of barbarity and rapine. The perfect justice system cannot exist but in a perfectly structured government, and thus when we inquire as to which architectonic designs are most capable of containing an ideal system of justice, we are really determining which constitutions are best. Although we have treated of this elsewhere,¹¹⁸ the Petitioner's claims regarding Respondent's injustice and the perfect justice system cannot be treated apart from this threshold question. As Rawls rightly noted, "A theory of justice depends upon a theory of society..."¹¹⁹ We must identify which form of association can maintain peace both internally as well as externally in order to discover the ideal receptacle for a just and enduring system.

Clearly, there can be no justice in a state that cannot preserve its own national existence. It will collapse, another state will take its place, and our discussion will move on to analyze the new state's potential for ideal justice. In the affairs of a state, reminds Maine, all enterprises are futile, all pursuits in vain, if it fails to secure national durability.

The first necessity of a state is that it should be durable. In matters of government, all objects are in vain and all talents wasted, when they fail to secure national durability. One might as well eulogize a physician for the assiduity of his attendance and the scientific beauty of his treatment, when the patient has died under his care.¹²⁰

The form of government most conducive to ideal justice must therefore be capable of longevity and stability: it must create and preserve internal and external peace. This truism underscores the relationship between constitutions and war, for the former are designed to prevent, or prevail during, the latter, and the latter never ceases but to impact and influence the structures of the former. Thus, it should be clear from the start that the primary inquiry concerning justice relates to constitutions, and that since the preponderant cause of constitutional change is war, the study of military matters will be of paramount importance if we are to identify the ideal system of justice. Let us not forget the words of Polybius, who recommended the study of constitutions, for what he said of Rome is true of all states:

¹¹⁸ See *The Sophomoric Discourses*, Book IV.

¹¹⁹ Rawls, *A Theory of Justice*, Part I, Chapter II, Section XI.

¹²⁰ Maine, *Popular Government*, Essay II.

“...the chief cause of success or the reverse in all matters is the form of a state’s constitution; for springing from this, as from a fountain-head, all designs and plans of action not only originate, but reach their consummation.¹²¹...[And] who is so worthless or indolent as not to wish to know by what means and under what system of polity the Romans [for example,] in less than fifty-three years succeeded in subjecting nearly the whole inhabited world to their sole government—a thing unique in history?...Who [could] regard anything as of greater moment than the acquisition of this knowledge?¹²²

Exploring the Petitioner’s claim of injustice therefore requires that we examine the constitutional nature of states, for ephemeral, unstable or tyrannical governments afford no justice.

THAT JUSTICE REQUIRES LIMITED GOVERNMENT; LIMITS ON WHO RULES, ON HOW, AND WHERE; I.E., LIMITS ON THE POSSESSION, TYPE AND RANGE OF POWER.

Before examining any particular constitutions, we need to recognize that government must be limited if justice is to exist at all. Unlimited power is arbitrary power, and arbitrary power is by nature unprincipled and hence unjust. We must therefore confess that any government, of any constitutional format, must be limited if justice is to live. It will be conceded that the very existence of a constitution indicates a limitation of government, for the constitution establishes structures, borders and boundaries of various institutions, resulting in sundry limitations upon the government. Were any feature of a constitution unlimited, indefinite, or omnipotent, there would cease to be any concrete limited government; A delimited, and by definition, unjust, government would result. Therefore, it is easy to conclude that all actual governments are limited insofar as they are described in concrete terms. However, it is in the degree of limitation that the more just are separated from the less, the more limited being generally amenable to greater justice, (up to an extreme point, after which the reverse is true) and the less limited are generally less amenable to justice, after a modest point. Mere limitations, however, while necessary to a just government, do not automatically create one. The correct type and degree are required for a just society to result.

These limitations on government power are of three principle types, the first being limitations upon types of powers, the second, upon scope of powers, and the third, upon the access to these powers. These three categories of limitation each produce a corresponding topic; ‘type’ concerns the tasks of government, ‘scope’ concerns the fields and objects upon which the tasks may be performed, and ‘access’ concerns who may exercise the power. This is merely a way of enumerating the subject, verb, and object of government power. When we discuss the ‘subject,’ we are discussing *who* has power; when we discuss the verb, we are discussing the general *nature* of that power, and when we discuss the object, we are discussing the *range* of things and

¹²¹ Polybius, *Histories*, Book VI, Chapter XI (Polybius’ Chapter V).

¹²² Polybius, *Histories*, Book I, Chapter I.

places within reach of that power. Thus we have the topics of who has power, the nature of that power, and the range of that power.¹²³ Thus, the topic of just government concerns limits on *who* rules, limits on *how* they rule, and limits on *where* they rule.

We must therefore analyze who should rule and how they should do so if we are to answer Petitioner's claims regarding ideal systems of government. We will begin with the question of *who* should rule, and later, we will turn to the topic of *how* they should rule. The question of *who* should rule can be answered in three basic ways: either one person should rule, some of the people should rule, or all the people should rule. Regarding *how* they should rule, there are again only three possibilities: by making, enforcing, and judging laws. The ideal government will consist in some combination of these six possibilities.

So, to reiterate Petitioner's initial complaint, Petitioner claims the United States lacks an ideal system of justice. We equate this with the claim that the United States lacks an ideal system of government. Our duty, then, is to say what an ideal system of government is, and whether the United States fits the description or not. An ideal government is a limited government, and limits are on who rules and how they rule. There are three possibilities for each, hence we must find the combination of these six which result in an ideal government, and then compare the United States to that ideal. Petitioner's claims will then either be verified or refuted.

THAT THERE ARE THREE BASIC CONSTITUTIONS: KINGSHIP, ARISTOCRACY, AND DEMOCRACY

There are three basic constitutions, known as the pure constitutions: the rule of one person on behalf of the whole, the rule of some on behalf of the whole, and the rule of all the people on behalf of the whole, called Monarchy, Aristocracy, and Democracy, respectively. Each has a corrupt variant. A selfish Monarchy, where one person rules not on everyone's behalf but on his own, is a Tyranny. Likewise, a selfish Aristocracy is an Oligarchy, and a selfish Democracy is anarchy.¹²⁴ Considering all possible combinations of these, any constitution's composition can be accurately described. These are ancient ideas. Plato's advocacy of mixed constitutions in *The Laws* may be the oldest extant description,¹²⁵ but Aristotle makes clear in the *Politics*

¹²³ We note that nature implicates range by definition, thus seems to render them one in the same. An enumeration of the type of power, or the verb, immediately limits and partially defines the scope of power, this since there are some objects which cannot be reached by some verbs; likewise, some areas are naturally beyond the reach of some powers. Uttering the verb makes some objects impossible. This argues that the topic of range, or the object of power, is really a subset of the discussion of type, or the verb. But range is still a distinct and important topic in its own right, however, since verbs limit range only in the extremes and say nothing about the increments leading away therefrom, and this is precisely where questions regarding the range of government powers are in fact relevant.

¹²⁴ For the original exegesis, see Aristotle, *Politics*, Book III, Chapter VII. Also, see Machiavelli, *The Discourses*, Book I, Chapter II.

¹²⁵ See Plato, *The Laws*, Book III at 693 D.

that there was considerable popular debate regarding constitutional mixtures during and perhaps even before Plato's time.¹²⁶

The meaning of Monarchy is relatively clear. One person rules absolutely. Call him or her king, emperor, autocrat, sultan, czar, the meaning is the same; one person rules. The meaning of Aristocracy is also clear. A group of people rule, which is to say, some people do not rule at all. It makes no difference who this group is. If the rich rule, it is called plutocracy, if the old, gerontocracy, if the meritorious, then meritocracy; all are species of Aristocracy, for the rule of any group will constitute an Aristocracy so long as they rule to the exclusion of others, but on behalf of the whole.

The third constitution, namely Democracy, or the rule of all, is far more slippery, for its definition has been abused and twisted nearly beyond recognition. We will adhere to the original definition, the direct rule of all the people. But since it is rarely used in that sense anymore, let us take a moment to review how it is currently used, and why we object to that usage. As Benn noted:

Democracy is difficult to define...because what one person would regard as a paradigm case another would deny was a Democracy at all. The word has acquired a high emotive charge in the last hundred years; it has become good tactics to apply it to one's own favored type of regime and to deny it to rivals. The most diverse systems have been claimed as democracies of one sort or another...¹²⁷

Indeed, the term is now used to describe nearly all kinds of governments. In fact, many states with the word democratic in their name are not democratic at all. What is worse, a whole crop of similar terms has arisen, each adding nothing but confusion, all groping at some variant of democratic-ness: Pluralism, polyarchy, popular government, free government, liberal government, majoritarian government. It has become a mess, and the chaos is promoted by academics and specialists who depend on the fog of vernacular for their honors and income. This court has no patience with such pollution, and we will use the word Democracy in the original sense, namely the direct rule of all the people. As a consequence, we will not say America is a Democracy, since its use of representatives attenuates the direct rule of all the people. We might say, however, that it is *democratic*, and when we say a state is democratic, we mean merely that *in some respects* all the people rule directly. To the extent that they do, the state is to that degree democratic.

There is also some ancient confusion regarding Democracy. It was, on occasion, termed Timocracy, but such is a mistake. In the *Nichomachean Ethics*, Aristotle refers to the "popular" constitution as Timocracy, wherein there obtains a mere property or honor qualification for power.¹²⁸ If everyone meets the qualification, this arrangement could be a Democracy, but such is not likely to be the case, and therefore we agree with Plato that a Timocracy is essentially an Aristocratic arrangement,¹²⁹ as it will

¹²⁶ See Aristotle, *Politics*, Book II, at 1265b3. This point was made by Sabine in chapter IV part III of his authoritative treatise, *A History of Political Theory*, 3rd Ed.

Holt, New York, 1961.

¹²⁷ Edwards, *The Encyclopedia of Philosophy*, entry: Democracy, by S. Benn.

¹²⁸ Aristotle, *Nichomachean Ethics*, Book VIII Chapter IX, at 1160a33.

¹²⁹ Plato, *Republic*, from 545 D.

invariably feature the rule of some, but not all, of the people.¹³⁰ Therefore, the ancient debate over the meaning of Democracy should confuse no one. A Timocracy is an Aristocracy. A Democracy, properly speaking, is the direct rule of all the people. The economic criteria of Timocracy is a priceless suggestion, but it is one which results in an Aristocracy, not a Democracy. This will be investigated later, when the political impact of economics on justice is more fully explored.

In summary, the question of who will rule is answered by some use or mixture of the three pure constitutions, namely the rule of one, some, and all the people, called Monarchy, Aristocracy, and Democracy, respectively, each having a corrupt version, Tyranny, Oligarchy, and anarchy. These are the basic constitutions. By applying and mixing these six, every existing constitutional arrangement can be precisely described.¹³¹ However, before discussing mixed constitutions, let us come to a more intimate understanding of each of the unmixed, basic forms.

THAT EACH PURE CONSTITUTION HAS A CORRUPT FORM: KINGSHIP, TYRANNY; ARISTOCRACY, OLIGARCHY; AND DEMOCRACY, ANARCHY

Each of the three pure constitutions is inherently prone to corruption due to the natural shortcomings of human nature. When rulers exercise power in the best interests of the people, a constitution is pure, be it Kingship, Aristocracy, or Democracy. Yet, human nature's weakness causes rulers eventually to ignore public well-being and govern instead according to their own self-interests.¹³² This is the reason why each pure constitution admits of a corrupted form: the rulers invariably stop leading in the interests of the people and instead pursue their own at the peoples expense. This degeneracy of leadership converts a Kingship into a Tyranny, an Aristocracy into an Oligarchy, and a pure Democracy into a 'selfish' Democracy, or anarchy.

The difference between selfish Democracy and Anarchy deserves some careful thought. In the *Discourses*, Machiavelli contended that the perversion of Democracy is Anarchy.¹³³ Yet, it is not at all clear that the selfish rule of all will result in chaos. If an individual is enlightened, their selfishness will be as well, and they will sometimes rule in the interests of others, when to their own purpose. This will not create chaos, but rather will turn anarchy by degree back towards Democracy. Thus, complete an-

¹³⁰ Unfortunately, even Plato interchanges these terms, using the term Democracy in the *Laws*, and Timocracy in the *Republic*. See Plato's *Laws*, at 693D, and Plato's *Republic*, at 545 D, respectively.

¹³¹ Biblical scholars will note that the division of worldly constitutions into six is eminently appropriate, for such is what Augustine calls the perfect number, being the first made up of its own aliquot parts, (*City of God*, Book XI, Chapter XXX), and such number defines the city of man, as it is the constituent of Man's number, 666. (Revelation 13:18).

¹³² Plato, *Republic*, 416 A. See also Aristotle, *Politics*, 1264a24, calling even greater attention the danger that rulers become self-serving; as when sheep-dogs turn into wolves, preying on the flock instead of protecting it.

¹³³ Machiavelli, *The Discourses*, Book I, Chapter II. "...the popular government lapses into licentiousness...into anarchy."

archy need not result from a degenerating Democracy. This argument echoes our earlier criticisms of Hobbes' formulation of the state of nature, where we observed that the natural and selfish impetus towards cooperation renders a war of all against all utterly impossible. We are allied with someone from birth: A mother, family, friends, and fleeting partners of every description besides. There never was a Hobbesian state of nature or a 'war of all against all,' and consequently, a Democracy cannot devolve into such a war, but will naturally feature selfish cooperation. To this extent, it will not be fully anarchic. Nevertheless, the notion of anarchy underscores the potential for failure in a pure Democracy. Complete anarchy is an impossible extreme, but various hues of anarchy will always characterize the degeneration of pure Democracy.

THAT THE BASIC CONSTITUTIONS CAN BE GIVEN EITHER *PER-CAPITA* OR ECONOMIC NAMES

The divisions of political power among either one, some or all of the people are *per-capita* divisions. However, the three basic constitutions can be defined in economic terms as well. The rule of the few could mean, and as a practical matter almost always does mean, the rule of the rich. Alternately, the rule of all is essentially the rule of the poor. This susceptibility of the three constitutions to economic categorization was deeply explored by Aristotle in the *Politics*.¹³⁴ Unfortunately, this economic dimension of the basic constitutions is nowadays commonly forgotten. For example, Blackstone neglects this in his *Commentaries*, as Bentham pointed out.¹³⁵ Therefore, as we proceed with our discussion of constitutions, we must bear in mind that although the three basic constitutions bear solely *per-capita* names, they are as well economic distinctions and are therefore inherently economic arrangements.

THAT ALTHOUGH TYRANNY IS THE WORST OF THE PERVERTED CONSTITUTIONS, MONARCHY IS NOT NECESSARILY THE BEST OF THE PURE

It is perennially reiterated that Monarchy is the best pure constitution, for under an enlightened despot, salutary rule will be carried out with greater speed and certainty than by aristocrats or the masses. But since such kingships are prone to fall into tyranny, if not during the reign of the enlightened despot, then certainly during that of his children, grandchildren, or regal heirs, they become equally the worst form of constitution, as the tyrant can legislate wickedly with the same dispatch and determination as could the enlightened king do justice. Therefore, most consider Kingship the best and worst form of constitution, as it is ideally the best but eventually the worst. Again, this is nothing new. Aristotle said as much in the *Politics*.¹³⁶ Nevertheless,

¹³⁴ Aristotle, *Politics*, Book III, chapter VIII, at 1279b11.

¹³⁵ Bentham, *A Fragment on Government*, Chapter III, Section XVIII, concerning Blackstone's *Commentaries on the Laws of England*, Volume I, Introduction, Section II.

¹³⁶ Aristotle, *Politics*, Book III, Chapter VI at 1279a35.

there are reasons to doubt that it is ever the best, even when considered in the ideal scenario of benevolent despotism.¹³⁷

The fatal flaw of Kingship is not only its propensity to fall into tyranny. There is a more pernicious evil present: the effect which the deprivation of liberty has upon human vitality. Loss of liberty fosters inertness in mankind, an obliteration of the will to compete, thrive, and excel, which is only exacerbated by the success of an enlightened king.¹³⁸ Monarchy ruins the human material of the state, and therefore it has far less power and energy than those constitutions which make beneficent use of the human spirit.¹³⁹ Hence, even the perfect Kingship ultimately becomes a disaster.

The peace of an enlightened despotism subtly dismantles the human character until the will to resistance is itself extinguished. Enlightened monarchy is a system which corrupts and breaks the will of the people over time, such that they will not recall their former power as individuals. A peace of apathy and servitude results. This is a Confucian peace, a *Japanese* peace. Sydney correctly notes this effect of Monarchy's peacefulness on the character of vigorous peoples throughout history:

...Such a peace is no more to be commended than that which men have in the grave...There is this peace in every wilderness...Where there are no men, or there are no brave men, there can be no war...The peace which the Romans established in the provinces consisted in the most wretched slavery and solitude...This is the peace the Spaniards settled in their colonies in the West-Indies, by the destruction of forty million souls. The countries [afterward] were very quiet when...left to fight in them...[there were] only a few miserable wretches, who had neither the strength nor the courage to resist....

The above mentioned evils...[proceeded] from a permanent cause, which will always produce the like effects. And history has testified that [Monarchy] has done the same in all places. Carthage was rebuilt after it had been destroyed by Scipio,...but produced no such men as...Hannibal:...Athens never had an eminent man after it felt the weight of the Macedonian yoke...Since the introduction of...absolute Monarchy, all power, virtue, reputation, and strength is perished from among them, and no man dares oppose the public mischiefs.¹⁴⁰

¹³⁷ Interestingly, Edmund Burke elevated despotism above Oligarchy with a practical argument, concluding that, "[a]ristocracy can boast none of the advantages of a despotism, miserable as those advantages are, and it is overloaded with an exuberance of mischiefs, unknown even to despotism itself," and exclaiming that, "Aristocracy is nothing but disorganized despotism." From *A Vindication of Natural Society*.

¹³⁸ This was investigated more thoroughly in *The Sophomoric Discourses*, Book VI, Chapter X.

¹³⁹ Trenchard and Gordon made this point forcefully in *Cato's Letters*, No. 73, April 21, 1722. It is a recurrent theme in Machiavelli's works as well. See Machiavelli, *The Prince*, Chapter V.

¹⁴⁰ Sydney, *Discourses Concerning Government*, Chapter II, Section XV.

Any manner of organizing government which destroys the liberty of the individual, however productive of pomp and flash in the short term, is bound to collapse of its own internal infections. This is the poisonous fruit of totalitarianism, absolutism, tyranny, dictatorship; call it what you will, it eats out the human soul and destroys the only true basis of national power, the liberty of the people. Nor does it matter whether this force is secular or ecclesiastical. As Diderot correctly observed, "Mankind will never be free until the last king is strangled in the entrails of the last priest."¹⁴¹ And as Hand recently reminded, there is an intellectual deterioration at the heart of this disease.

...any organization of society which depresses free and spontaneous meddling is on the decline, however showy its immediate spoils;...Man is a gregarious animal, extremely sensitive to authority; if it will only indoctrinate him thoroughly in his childhood and youth, he can be made to espouse any kind of orthodoxy...[And] once you get people believing that there is an authoritative well of wisdom to which they can turn for absolutes, you have dried up the springs on which they must in the end draw even for the things of this world. As soon as we...come to rely on accredited bodies of authoritative dogma, not only are the days of our liberty over, but we have lost the password that has hitherto opened to us the gates of success as well.¹⁴²

To conclude Hand's thought, let us always remember that while successful political servitude may dazzle the eye, it invariably stands upon generations of freedom, and the very want of such freedom will eventually cause its self-destruction, provided it does not conquer all in the meantime. This is the inherent evil of Kingship, even of an enlightened type.

THAT PURE DEMOCRACY IS AS DETESTABLE AS TYRANNY

Kingship being so wicked in either form, many might turn to pure Democracy as the only tolerable pure constitution. We have seen that insofar as pure Democracy decays into anarchy, this cannot be the case. But pure Democracy operating smoothly, free from anarchy, with each citizen exercising power on behalf of others, is equally evil. In pure Democracy, the people make and execute laws by themselves, mixing the corrective and distributive functions; the citizens become progressively habituated to despise all laws and restraints; matters requiring legislative competence are decided by an inexperienced mob, and for all this, there is no offsetting peacefulness attached to Democracy *per-se*. We have already observed the injustice of such comminglings of corrective and distributive justice. As we shall see in far greater detail when we examine the separation of powers, this combination has been derided as the very essence of despotism, incompatible with liberty and stability alike.

As Kant noted, pure Democracy presents the spectacle of the lawmaking and executive faculty being exercised by the same entity, each person both making and enforcing their own laws.¹⁴³ This is why pure Democracy has been criticized as a

¹⁴¹ Diderot, Denis. *Dytherambe Sur Le Fete De Rois*.

¹⁴² Hand, *The Spirit Of Liberty*.

¹⁴³ Kant, *Kant's Political Writings*, Part IV (Perpetual Peace, a Philosophic Sketch.)

government which ultimately destroys the rule of law. Plato notes that in democracies, the citizens become so hypersensitive to any authority that they finally ignore all the ordinances and reject any suggestion of restraint, acting instead like “horses and asses, that are wont to hold on their way, with the utmost freedom and dignity, bumping into everyone who meets them without stepping aside.”¹⁴⁴ This criticism was implicit as well in Herodotus, who noted that the Spartans were free men, but not free in all things, for the laws were their master—a more fearsome master than any Persian tyrant.¹⁴⁵ We may conclude by supplying Herodotus with the missing causal language: they were free men *because* they were not free in all things, *because* the laws were their master, and *because* they feared this master. In recent times this point was reiterated by Hand, who stated “A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few...”¹⁴⁶ This inherent lawlessness of Democracy renders it unstable, for eventually people grow desperate under such pandemonium and give power to anyone promising to deliver them from their suffering. They then watch as this savior establishes a tyranny over them with the power they gave him. As Burke lamented, “[Ah] Democracy. That masterpiece of Grecian refinement and Roman solidity...No sooner is this political vessel launched than is it overset. A popular man is given power...and then plunges those who gave it into slavery.”¹⁴⁷

Another unfortunate feature of pure Democracy is that it allows each individual directly to participate in making laws for the whole state, whether they are experienced or not, whether ignorant or wise. As a result, the laws produced by a direct Democracy are likely to reflect the average sentiment rather than the most enlightened, and for this reason as well as the others, direct democracies are miserable, for they prevent merit from preponderating in the lawmaking process. So, pure Democracy is wretched because it annihilates the rule of law and replaces it with the rule of the jungle, and those laws it does manage to establish are usually myopic and inconsistent.

Finally, there are those who defend Democracy on the grounds that it is intrinsically peace-loving and that democracies do not make war upon each other. Were this true, then Democracy might actually be the best of the pure constitutions. Unfortunately, Democracies are not unreservedly peace-loving. They have often been belligerent, even imperial, as was the case with democratic Athens, and they have on occasion even attacked each other, as when democratic Athens attacked democratic Syracuse.¹⁴⁸ We point this out only to remove this one last misperception of Democracy. There may be relatively peaceable combinations of constitutions, but a Democracy alone is not necessarily so peaceful. A pure Democracy is as peaceable or warlike as its people and their interests. When these interests differ from, or are irreconcilable with, those of their neighbors, belligerence is likely, despite the democratic form, which being governed by the unrestrained passions of the people is likelier than the other pure constitutions to push the state into an ill-considered war. It is true that the interests of democracies usually coincide, but this does not necessarily produce

¹⁴⁴ Plato, *Republic*, 563 C.

¹⁴⁵ Herodotus, Book VII, Chapters 103-104.

¹⁴⁶ Hand, *The Spirit Of Liberty*, Chapter 26.

¹⁴⁷ Edmund Burke, *A Vindication of Natural Society*.

¹⁴⁸ See Generally, Gilbert, *Must Global Politics Constrain Democracy?*, especially Chapter IV.

peace. A mutual desire for something only useable by one alone is nevertheless productive of discord, though it is a 'coincidence of interests.' It is not necessarily the case that democracies will be capable of simultaneous mutual satisfaction any more than aristocracies or monarchies. For all of the above reasons, we must conclude that even pure Democracy provides no sturdy vessel of government to those searching for a stable constitution, and it is therefore no less detestable than tyranny.

**THAT PURE ARISTOCRACY HAS, FOR THE MOST PART,
EVEN LESS MERIT THAN EITHER MONARCHY
OR DEMOCRACY.**

In his *Vindication of Natural Society*, Burke remarked that Aristocracy was worse than either Tyranny or anarchy, upon the following arguments:

In one respect the aristocracy is worse than the despotism...[A] despotism which is this day horrible to a supreme degree, by the caprice natural to the heart of man, may, by the same caprice otherwise exerted, be as lovely the next; in a succession, it is possible to meet with some good princes...[But] never was it known that an aristocracy, which was haughty and tyrannical in one century, became easy and mild in the next...[This] species of government is so galling, that whenever the people have got the least power, they have shaken it off with the utmost indignation, and established a popular form. And when they have not had strength enough to support themselves, they have thrown themselves into the arms of a despotism, as the more eligible of the two evils...In short, the regular and methodical proceedings of an aristocracy are more intolerable than the very excesses of a despotism, and in general, much further from any remedy...Aristocracy...[can] boast none of the advantages of a despotism, miserable as those advantages are, and it is overloaded with an exuberance of mischiefs, unknown even to despotism itself.¹⁴⁹

Thus, pure Aristocracy can be seen as having, for the most part, even less merit than either monarchy or democracy.

¹⁴⁹ Burke, *A Vindication of Natural Society*.

THAT ARISTOCRACY THEORETICALLY ADMITS OF PERFECTION WHEN AMOUNTING THE RULE OF THE WISE, WHICH IS TERMED MERITOCRACY.

A special case of Aristocracy occurs when the rule of the few is actually the rule of the wise. Such is called meritocracy. This constitution was explored by Plato in the *Republic*,¹⁵⁰ where the rule of the guardians, the wisest members of the society, was contemplated as a form of government.¹⁵¹ Aristotle followed this in the *Politics*, where he asserted the natural right of the wise to rule over the ignorant.¹⁵² The term Meritocracy could also apply to Monarchy by enlightened despot, but most theories of Meritocracy feature rule by some enlightened group and are thus aristocracies.¹⁵³ The practical difficulties with Meritocracy are twofold. Firstly, the allegedly wise cannot be trusted to identify themselves and assume power generation after generation without risking deterioration into Oligarchy. At some point they will lie, cheat, steal, elevate their friends and relations to office, or sell offices for private gain. Secondly, the actually wise are bound to be few in number and cannot reliably control the masses, who will certainly outnumber them many-fold and be naturally reluctant to obey. After all, the mass opinion will only occasionally coincide with the wise course of action. For both reasons, the Meritocracy is, while theoretically the most attractive of the pure constitutions, quite difficult to establish and make durable.

Despite its shortcomings, the Meritocracy is of overriding, perhaps decisive, interest. Since a Meritocracy can logically be formed only from a Monarchy or an Aristocracy, it constitutes a rejection of Democracy. An enlightened despotism or group of guardians can form a Meritocracy, but as soon as everyone is admitted into leadership on an equal basis, as in Democracy, the ignorant or average will predominate and the government will no longer be a meritocracy. Thus, only Democracy is irreconcilable with Meritocracy.¹⁵⁴

Additionally, Meritocracy implies the irrelevance of consent to ideal government. Consent of the governed is theoretically inimical to pure Meritocracy, in which wisdom is the sole principle of legitimate leadership. This feature of Meritocracy was concisely restated by Strauss:

[Under] the rule of the wise...it would be...absurd to hamper the free flow of wisdom by consideration of the unwise wishes of the unwise; hence, the [truly] wise rulers ought not be responsible to their unwise subjects. To make the rule of the wise dependent upon election by the unwise

¹⁵⁰ Plato, *Republic*, 473 D, defining Meritocracy as the ideal government, wherein either kings are philosophers or philosophers become kings, and 375 E, that the Guardians must be the wise.

¹⁵¹ This society was not ideal in Plato's mind, but was removed from the ideal, such that its defects might yield a more vivid view of the true nature of justice. Thus, Plato's *Republic* was a 'city with a cold' rather than the perfectly healthy state. Plato, *Republic*, 368 D.

¹⁵² Aristotle, *Politics*, Book I, Chapter II, at 1254b5.

¹⁵³ Plato, *Republic*, 445 E.

¹⁵⁴ Plato, *Republic*, 445 E.

or consent of the unwise would be to subject what is by nature higher to control by what is by nature lower, i.e. to act against nature.¹⁵⁵

Thus, Meritocracy obviates consent by definition, which is not surprising, for as we noted above, Meritocracy is fundamentally incompatible with Democracy.

THAT CONSENT IS THE MECHANISM OF DEMOCRACY

That Meritocracy at once precludes Democracy as well as consent suggests that these latter two notions may be fundamentally related, and in fact they are. Consent is the mechanism of Democracy, the conduit whereby each member positively expresses their individual will. Thus, consent is critical to the understanding of constitutions, for it forms the 'way' of Democracy, or the *Tao* of Democracy, as Lao Tsu might have said. When mixed constitutions feature consent mechanisms they are to that extent democratic in nature.

Parenthetically, we must also notice the subtle hues of meritocracy implicit in these democratic devices, for voting, elections, referenda, etc. all aim at either eliminating unwise, or selecting wiser, persons and things. Thus, these structures through which Democracy operates are themselves meritocratic, though Democracy is in the wider sense preclusive of Meritocracy. This is true of all democratic institutions save the selection of officers by lottery, which is still aristocratic, but not meritocratic. It is democracy devoid of these consent structures that is properly termed anarchy. Therefore, when we conclude that Meritocracy precludes Democracy, we must bear in mind the fact that the structures of democratic power are nearly always meritocratic. As long as there is voting, there will be choices made as to the best leadership. We shall see how critical this is when we analyze the separation of powers and the role of political parties therein.

THAT THE PURE CONSTITUTIONS ARE DOOMED TO FALL INTO A RECURRENT CONSTITUTIONAL CASCADE

The three pure constitutions are intrinsically unstable. They become perverted, collapse into revolution, and one of the remaining three rises in their place. They revolve in this vicious cycle of revolution perpetually. We call this the constitutional cascade.

The mechanics of the constitutional cascade have been examined by many. Machiavelli explained that all Kingships eventually fall into tyranny as absolute power corrupts the descendants of even good kings. This ultimately provokes an uprising of the ambitious, who lead the masses against the tyrant and establish an Aristocracy. This new Aristocracy, while perhaps pure during the reign of its founders, eventually becomes perverted into an Oligarchy, as the aristocrats hand power to their offspring, who, having never known the mischiefs of tyranny, proceed to abuse the masses. This enrages the people, who endeavor to stamp out this new pestilence as they did the last, supporting anyone willing to lead their cause. A revolution ensues and the people establish a Democracy, being loathe to revive either Monarchy or Aristocracy. Yet the

¹⁵⁵ Strauss, Leo, *Natural Right and History*, Chapter IV.

difference between a Democracy and its corrupt form, anarchy, wherein each rules in his own interest, is so slight that the degradation of the former into the latter is both swift and imperceptible. The anarchic nature of the Democracy will, in due time, introduce into society such lawlessness and chaos that the people finally hand power to anyone who seems fit enough to deliver them from their suffering. "A popular man is given power...and plunges into slavery those who gave it," thus reinstating a Kingship.¹⁵⁶ Around and around this cycle goes, bringing death and destruction to the people upon each slide from one constitution to another.¹⁵⁷ The principle of the constitutional cascade is as old as the *per-capita* denominations of the pure constitutions themselves, although many differ as to the exact causes and stages of the revolutionary cycles.¹⁵⁸

It was long the fate of humanity to suffer under this cycle, for human nature is such that power corrupts and constitutions get corrupted. Although humanity never willingly errs,¹⁵⁹ it is intrinsically self-interested, attempting at all times to maximize what it perceives as its own existence, according to an imperfect conception thereof. This principle of human nature must be fully understood if our definitions of the constitutions are to make sense, for it forms the mechanism of the constitutional cascade.

THAT THE CONSTITUTIONAL CASCADE IS INDETERMINATE, NOT FIXED AS MOST THEORISTS HAVE ASSERTED

Political theorists are inclined to believe that the constitutions arise and disintegrate in fixed cycles. They are not so fixed. The revolutions are instigated by the factional powers which preponderate at the time, and this may be any disenfranchised group or the whole populace. The forces which impel the factions to act, the sources of their powers, are identifiable and fixed. Thus, the patterns of revolution are fixed, but upon principles of power, not orderings of constitutional stages.

Montesquieu, who understood this, argued in the *Spirit of the Laws* that the origins of constitutions and laws were not fixed to a inevitable progression, but rather were tied to the nature of the climate, religion, mores, manners, customs, and history of the peoples of a state.¹⁶⁰ These forces are influential upon the laws which create political rights, i.e., the laws which give structure to a constitution.¹⁶¹ Thus, we are not alone when we say that the nature of constitutions and their cascade into one another is not a preordained sequence dependent upon preexisting constitutions, but rather geared to more fundamental principles, like the power and nature of the factions present within a state.

¹⁵⁶ Burke, *A Vindication of Natural Society*.

¹⁵⁷ Machiavelli, *The Discourses*, Book I, Chapter II.

¹⁵⁸ Plato posits the cascade in the *Republic*, Book VIII, at 545 B-563 E. Polybius advances an alternate ordering in his *Histories*, Book IV, chapter IV, 2-12.

Interestingly, Machiavelli's formulation, *supra*, follows Polybius.

¹⁵⁹ Nobody wishes to do evil, but many do evil thinking it to be good. For the unanswerable proof, see Plato's *Protagoras*, at 358 C-D, and *Gorgias*, at 467 C-468 C and 500 A.

¹⁶⁰ Montesquieu, *The Spirit of the Laws*, Part II, Book XIV, Chapter I, and again in Part III, Book XIX, Chapter IV.

¹⁶¹ Montesquieu, *The Spirit of the Laws*, Part II, Book XI, Chapter I.

Those who did not understand this were many. Machiavelli emphatically states that the constitutional cascade which he outlines recurs perpetually, from the same causes each time.¹⁶² Plato assumes a fixed order of disintegrations in the *Republic*, where the stages are said by analogy to move from Democracy to Oligarchy, to Democracy, to tyranny, in an impliedly fixed order.¹⁶³ The great historian Polybius insists that the stages are invariable in his *Histories*, Monarchy arising first, followed in succession by tyranny, Aristocracy, Oligarchy, Democracy, and anarchy.¹⁶⁴ Aristotle believed that the stages of constitutional revolution were fixed as well,¹⁶⁵ as did Cicero, according to his *De Republica*.¹⁶⁶ Finally, in the *Social Contract*, Rousseau takes great pains to defend the idea of fixed revolutionary cycles.¹⁶⁷ The mere assertion of an incumbency of stages, however, is enough to doom each of these theories.

The constitutional cascade is not governed by a sequence of stages, but by shifts in property ownership within a society. Thus, the future sequence of revolutions is not knowable by reference to a list of former constitutions, but it is still calculable. This insight is made by Harrington, who explains that property arrangements are the fundamental forces behind revolution.¹⁶⁸ He states that property must be distributed among the three 'great interests,' the Monarchy, the Aristocracy, and the people, and that the resulting proportions determine the form of government axiomatically.¹⁶⁹ Accordingly, when the property is monopolized by the party in power, revolution will be unlikely, but when distributed among those lacking political power, revolution occurs and power inexorably flows to those holding or gaining the property. Harrington proves this by reminding that military power follows property. Those possessing property ultimately control the military. In his analogy, government depends on the sword, but swords are useless iron without hands, and the hands belong to the people, which has a great belly and must be fed ultimately by the propertied. Thus, the propertied eventually inherit the military power, and political power is never long to follow, the shift being in reality a revolution.

It is now possible to see more clearly the reason why perverted constitutions fall. Those in power arrogate property and rights to themselves, whereupon those deprived organize to take them back, causing a revolution. Thus, although many Political theorists believe that the constitutions arise and disintegrate in fixed cycles, the sequence is actually not preordained, but rather occurs as various factional powers preponderate from time to time, and this may be any group or the whole populace, whichever controls the balance of property.

¹⁶² Machiavelli, *The Discourses*, Book I, Chapter II.

¹⁶³ Plato, *Republic*, Book VIII, at 545 B-563 E.

¹⁶⁴ Polybius, *The Histories*, Book IV, Chapter IV, 2-12. Differing from Plato, Polybius nevertheless credits the Athenian with having better outlined this cascade.

¹⁶⁵ Aristotle, *Politics*, Book III, Chapter XV, at 1286b10.

¹⁶⁶ Cicero, *De Republica*, Book I, Chapter XLIV, parts 68-69.

¹⁶⁷ Rousseau, *On the Social Contract*, Book III, Chapter X, 1st footnote. (The contortion is comical.)

¹⁶⁸ Harrington, *Oceana*, First Part of the Preliminaries.

¹⁶⁹ Harrington, *A System of Politics*, Chapter II, Precepts VII and VIII.

THAT NOT ALL POLITICAL UPHEAVALS CHANGE A CONSTITUTION

We must also recognize that many civil wars result in no constitutional change at all, or merely shift a perverted constitution back to its pure form. Some revolutions merely change the players or shift the priorities and motives of the government without altering its structure. As Aristotle explains, some political upheavals are not revolutions at all, but rather violent substitutions of new persons into the same constitutional framework, or involve only partial constitutional change:

Changes which may take place [in states] may be of two kinds, according to whether they involve a complete abandonment of a constitution for another or not. Examples of the former are from Democracy to Oligarchy, [or] from Oligarchy to Democracy. In the other case they prefer the established arrangement (oligarchy or monarchy, for instance), but want to run it themselves. Or again, it may be a matter of degree: they may wish an existing Oligarchy to become more broadly or less broadly based, an existing Democracy to be more democratic or less, ... There are also attempts to change only a part of a constitution—the establishment or abolition of a particular office, for example...¹⁷⁰

Violent change by substitution rather than revolution is particularly common in Kingships, which often feature repeated exchanges of tyranny for tyranny. For example, in a one-hundred year period, A.D.192 through A.D.292, the Roman people suffered the violent successions of no less than *thirty-four* different tyrants.¹⁷¹ As in Rome's case, a constitution may fall into dysfunction countless times without revolving into a different constitutional arrangement at all. It is therefore easy to see that not all political upheavals change a constitution.

THAT CONSTITUTIONAL CHANGE IS NOT BEST ACCOMPLISHED BY SOLE ACTORS

It is critical to know how each constitution arises and declines in order to found a new state, alter an existing one, or analyze the various parts of a mixed constitution. The several theories of cascade underscore the propensity of pure constitutions to fall apart, and much can be learned from this regarding ideal and less than ideal constitutions. The cycles of the constitutional cascade are not fixed, but a keen knowledge of their presumed sequences may afford a chance to avoid a serious miscarriage of progress.

It is often said that Kingship is the first form of government to arise among mankind, though some posit an unstructured state of nature preceding this, akin to

¹⁷⁰ Aristotle, *Politics*, Book V, Chapter I, from 1301b6.

¹⁷¹ Bunsen, *A Dictionary of the Roman Empire*, Appendix I.

Anarchic Democracy.¹⁷² This idea is seized upon by Machiavelli, who believes that the reorganization of government requires, as a preliminary step, the establishment of a Kingship.¹⁷³ It is for him, a critical first step in the formation of a new political order, out of which might someday grow a healthy Republic. Certainly, the concentration of political power in an individual allows more expeditious and unembarrassed change than possible by committee. This is because the committee by nature contains heterogeneous opinions, whereas the individual is normally a unification of cooperative convictions. Correspondingly, ancient nations, be they the Athenian Democracy, the Roman Republic, China, or the various nations of the Indus, the Nile, and Tigris rivers. So, it may have appeared to Machiavelli that political beginnings require Kingship, though he recognized that the lucky ones who transitioned out of this wicked form of political union by establishing mixed constitutions with balanced elements of Monarchy, Aristocracy and Democracy, historically dominated their less enlightened counterparts.

However, he who takes Machiavelli's advice risks error, for constitutional change is not best effected by a sole actor. The dynamics of a reform group check the despotic inclinations that steadily creep to the surface of every prince's character, and thereby insure the object of reform to a greater degree than their procedural insufficiency thwarts it; and he who trusts his future to the whim of a single person is gambling at long odds, for how often has history furnished an example of an individual reformer at once lucky enough to succeed, enlightened enough to construct a strong constitution, and virtuous enough to leave absolute power on the table to be divided up among the constituent parts of the government? It is a rarity worthy of immense praise, even in Machiavelli's eyes.¹⁷⁴ Therefore, sole reformers must never be trusted, and the mere recourse to a predetermined sequence of constitutional cycles will not always aid the reformer or the builder of states, but might go far to mislead him and plunge a people into tyranny. Reform must be enlightened and restrained, not spasmodic and explosive, if it is to have lasting salutary effect, and the automatic resort to Monarchy as the mechanism of reform is usually a deadly error.

With this we may conclude our preliminary analysis of the basic constitutions and their perversions, and reemphasize that by themselves, the pure constitutions are useless to mankind, and so are their corrupt counterparts.

¹⁷² See Rousseau, *The Social Contract*, Chapter II, See also Hobbes, *Leviathan*, Part I, Chapter XIII.

¹⁷³ Machiavelli, *The Discourses*, Book I, Chapter IX.

¹⁷⁴ We have defended Machiavelli at length elsewhere. But for those who protest our praises of him here and, having read only *the Prince*, contend that Machiavelli advocated the establishment of tyrannies, we defend both him and ourselves by quoting his words in *The Discourses*, "Governments of the people are better than those of princes," (Book I Chapter LVIII) and also, "Those are doomed to infamy and universal execration who have destroyed religions, who have overturned republics and monarchies, who are enemies of virtue..." (Book I, Chapter X).

THAT TRUE GOVERNMENTAL STABILITY ARISES ONLY FROM THE PRESENCE OF A MIXED CONSTITUTION

By mixing the pure constitutions together, mankind discovered that the inherent weakness of each could be overcome without eliminating the advantages of any. Thus the mixed constitution was born, combining elements of Democracy, Aristocracy, and Monarchy, or at least two of these three. The resulting state attained a strength impossible under each pure constitution individually, since the introduction of a competitive element retards abuse and corruption.

A blending of the basic constitutions requires that power be split between pure constitutional groups, as when a king assents to share power with the nobility, thereby blending the monarchic and aristocratic constitutions, or when a Democracy elects representatives, creating elements of Aristocracy, and so forth. Any two of the three basic constitutions can be blended and reduce the tendency towards corruption and instability which attend either one in its pure state. This improvement is even more pronounced in the case of a 'triple mixed' or 'tripartite' constitution, which contains elements of all three pure constitutions. Historical examples usually tell us that the rise of the dual mixture precedes the triple, as was the case in both Rome and England, as we will see. However, let us not casually pass over the superiority of the 'triple mixed' or 'tripartite' constitution, containing a mixture of Monarchy, Aristocracy, and Democracy. Rather let us understand why it is superior, for the sturdy architecture of the tripartite constitution will later be of inestimable value in our analysis of far more bewildering entities than these, such as the ideal court of law.

THAT THE TRIPLE MIXED CONSTITUTION IS SUPERIOR TO THE DOUBLE, AS THE DOUBLE OFTEN PRODUCES EITHER NULLITY OR FRATRICIDE

The triple mixed constitution, blending Monarchy, Aristocracy, and Democracy, is superior to the double mix because the trilateral competition of the former is more effective than the bilateral of the latter. This is because a preponderance of will cannot emerge between two equal powers, which produce by their collision a nullity, whereas stalemate is impossible between three equal powers, two of whom must naturally overbalance the third. Progress among bilateral antagonists can be made only by the physical compulsion of one by the other, whereas progress among tripartite powers can always be made by persuasion of the third party, thus avoiding public calamity and preserving the collective product of society from the perils of revolution.

Let it be clear that the compulsion which occurs in the dual constitution is not always productive, but often violent and revolutionary. The dual constitution, while better than the pure forms, ultimately occasions instability because it throws each power into a competition insoluble but by the destruction of the other. In a bilateral contest, there is no tie-breaker. We may note that where the two powers are unevenly mixed, the benefits of mixture do not accrue, the powerful being, to the extent of their preponderance, free from the will of the weaker, and the people exposed to nearly the same tyranny as a pure constitution. But when the power of the two is equally mixed, neither can progress without the cooperation of the other. This at once checks the in-

solence and ambition of either, while promoting the benevolence of both. But when a mutual antagonism cannot be abridged by the finer qualities of the human spirit, a failure likely to occur with despairing regularity, no progress whatever will be made, as each force, being equal, will be unwilling to compromise with and unable to prevail over the other. Such a political stalemate will cause the nation to stagnate, threatening the simultaneous destruction of both powers. The sharpening danger may produce a compromise, but history shows that this is not a reasonable expectation. Progress under such a stalemate is usually made by one power attacking and weakening the other. This is why political fratricide often occurs in dual constitutions.

This defect of the dual constitution was highlighted by Harrington in his critique of British Parliamentary Monarchy. According to Harrington, the British government:

...hath been cried up to the skies as the only invention whereby at once to maintain the sovereignty of a prince and the liberty of the people; whereas indeed it hath been no other than a wrestling match, wherein the nobility, as they have been the stronger, hath thrown the king, or the king, if he have been stronger, hath thrown the nobility.¹⁷⁵

Thus, the double mixed constitution is rightly considered better than the pure forms but inferior to the triple mixture, which contains precisely three per-capita elements, one of Kingship, one of Aristocracy, and one of Democracy, though, admittedly, this will ultimately be a mixture of Tyranny, Oligarchy, and anarchic Democracy. Nevertheless, the results of this mixture are excellent. The shining merit of the mixed constitution is that it places the evils of the perverted constitutions in mutual check, allowing the freedom of the people to arise within a structured system of 'ordered liberty.'¹⁷⁶ The balance achieved by the mixed constitution is a product neither of agreement nor comity, but rather competition and confrontation among the elements. The presence of the three balanced elements in a triple mixed constitution results in the structural inability of any one element to dominate the remaining two. This will only be possible, however, if the three elements are balanced at the outset such that each has not only an equal power, but also a measure of negative control over the other two. The result is that the selfishness of each will be tempered and the state will be much less prone to revolution. When such balance exists, mutual checks and balances will restrain each element from subjugating the others and force cooperation among them. In the triple-mixed constitution, two elements will not likely subvert the third, for such either leaves one of the remaining pair the most powerful, or else renders both equal. So, each element is deterred from destroying another for fear of being either dominated or stalemated.

We must note that freedom of speech is another condition required for these checks and balances to operate. Without the open and free circulation of news and ideas, one branch may fail to respond to the encroachments of the rival branches, and the triple balance may be overturned, resulting in a revolution in favor of the informed branches. This is an important link between the freedom of speech and the separation of powers. Through free speech each branch becomes informed regarding their own interests and dangers. This critical role of free speech is often obscured by

¹⁷⁵ Harrington, *The Commonwealth of Oceana*, 2nd part of the Preliminaries.

¹⁷⁶ 'Structured Liberty' is a phrase borrowed from *Palko v. Connecticut*, 302 U.S. 319, 325.

the primary role it plays in the identification of the common good and the formulation of enlightened public policy. We must bear constantly in mind that free speech not only aids the general understanding of society and the discovery of truth, but that it is a critical component of the triple mixed constitution, without which one branch eventually and invariably comes to possess more information than the others and employs it to their ultimate destruction.

Parenthetically, this is in accordance with our earlier observation that political power ultimately follows property and economic power, and a shift of property away from the established governing powers results in revolution. Here, intangible property shifts from one branch to another, causing a revolution.

THAT THERE MUST NEVER BE A QUADRUPLE MIXED CONSTITUTION, OR ANY OTHER MIXTURE WHICH SIM- PLY RESOLVES INTO A DOUBLE MIX OR SINGLE CONSTITUTION.

The triple mixed constitution is ideal for the reasons already stated. It does not follow, however, that the addition of yet another per-capita element will enhance its stability. On the contrary, additions beyond the triple mix will subvert the government's balance. The reason is clear: a quadruple constitution lacks the unique impetus towards mutual cooperation present in the triple mix. It is true that a single element could hardly overthrow the remaining three, but each element will invariably find its interests closely allied with one of the remaining elements, whereupon the quadruple mix will function as a double mix, the four parties having resolved roughly into two groups whose cooperation will be stymied by the equal bifurcation of power, precisely as was the case with the double constitution. In the alternative, the quadruple mix may devolve into a triple mix, if three elements conspire at the elimination of the fourth. This would result in the ideal triple balance, but only through the procedure of revolution and instability, which is the very evil we seek to avoid by mixing the constitutions. Thus, a quadruple mix is no better than a double, and possibly worse for its potential revolutionary metamorphosis into a triple mixed constitution. The destruction attendant to such a revolution may even outweigh the future benefits of devolving into a stable triple mixed constitution, which will devolve no further if equally trifurcated, as we have seen. We shall see the danger of an actual quadruple mix later, when we examine independent government agencies, which have been characterized as a fourth branch of American government.¹⁷⁷

Let us also consider the possibility of a five-part mixed government. As it contains an odd number of elements, one might expect it to be free from the perils which doom the quadruple mix. This optimism, however, is disappointed in fact. The five-part mix is subject to the same defects as the quadruple mix, only more so, being even more easily subverted. It is more easily subverted since four parts may oppose the

¹⁷⁷ The term 'fourth branch' is used in *United States ex rel. Brookfield Construction Co. v. Stewart*, 339 F.2d 753, 886 (D.C. Cir. 1964). See Also, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

remaining one with relatively less risk than could three in the setting of the quadruple mix.

As the number of elements increases beyond five, instability grows in two respects. First, it grows in proportion to the weakness of any single element in relation to an ever expanding set of opposition elements, and second, it grows as the increasing number of elements resolve ever more perfectly into two camps, the remainder dwindling eventually to insignificance and resulting essentially in the stalemate of the double-mixed constitution. In the most extreme instance, when the number of elements approaches the number of citizens, the constitution will begin to take on the characteristics of a pure Democracy, destroying all the benefits of the mixed constitution. Thus it is clear that the triple mixed constitution is the optimal format, being more stable than the single, double, quadruple or mega-mixed constitution.

THAT CHRISTIANS MAY SEE THE TRIPLE MIXED CONSTITUTION AS THE EARTHLY COUNTERPART OF THE HOLY TRINITY

On the ecclesiastical plane of analogy, the triple mixed constitution can be seen as the earthly counterpart of the Christians' holy trinity; a trinity for the city of man. As we noted earlier in footnote, the basic constitutions with their inherent evils, being six in number, correspond to the biblical number of man and the beast, and exemplify man's corruption and imperfection. Hence, the resolution of the six unhealthy constitutions into the triple mixed constitution mirrors the progress of man from the unholy to the holy, from the beastly constitutions to the earthly trinity. This forms a basis for asserting a political counterpart to man's divine salvation. However, it is not our purpose to treat of such things here. But before we continue, let us indulge in one last biblical analogy, for having raised the notion of the triple constitution resembling the trinity, it is only natural to be curious as to which parts of the one resemble the other. In the per-captia denomination of mixed constitutional theory, the rule of one corresponds to the father, the rule of the some, to the son, who is leader of his disciples, and the rule of all, to the holy spirit, which permeates all parts of the whole. If we consider instead the functionalist denomination of constitutional theory, then the father is found in the legislative branch, for such establishes the rules, the son is the executive, bringing such rules to bear upon people, and the holy spirit is the judiciary, representing the principles, equities, and doctrines of the law.¹⁷⁸ Others may note on a more secular, but no less symbolic, level, that the three-sectional peace symbol can imply the peace afforded by the triple mixed constitution as opposed to a monolithic structure, for the peace symbol insinuates that peace is found in a division of three.

¹⁷⁸ Assuming, of course, as do contemporary Christians, that the Arian controversy has been perfectly resolved in favor of the Nicene and not the Homoousian Creed. See Generally, Gibbon, *The Decline and Fall of the Roman Empire*, Chapter XXI. Gibbon also sets forth an intriguing analysis of the constitutional implications of the Church government, particularly in reference to its use of representative systems and Democracy, Id. at Chapter XV, Part V.

THAT REPUBLICS ARE A SPECIAL CASE OF MIXED CONSTITUTION

Republics are simple to define. A Republic is any mixed constitution which contains a democratic element. So long as the people have some institutional voice, a Republic is at hand. Therefore, there will clearly be many different kinds of Republics. But since the democratic element naturally operates through consent structures, Republics almost always feature elective systems, usually for electing governing representatives. As a result, most consider Republics to be representative Democracies by connotation. So, although they usually turn out to be representative Democracies, they are essentially any mixed constitution with a democratic element, with or without representatives.

Thus, the Republic blends Democracy and either Aristocracy or Monarchy, but by connotation it is essentially a Democracy which elects a government of representatives, thus mixing the rule of all and the rule of some.¹⁷⁹ The Republic is naturally inclined to advance beyond this double mixture into a triple mixed constitution, for the smaller representative group usually elects or recognizes a leader, or yields a portion of its authority to a popular and powerful member. In such case, the rule of one is introduced and a roughly triple constitution emerges.

Because of its democratic appeal, the term 'Republic' has been used throughout history both to flatter usurpers and swindle the masses. Accordingly, it has been affixed randomly to the names of countless states, being thereby debased into meaning simply a "state" *per se*, whatever its constitutional form. This misuse of the term becomes evident in the adjectival form, since a 'Republican state' is redundant when Republic means 'state.' This is a popular but useless sense of the term, one which affords polluted and despotic governments the chance to masquerade as salutary and enlightened regimes, such as did the Union of Soviet Socialist Republics, which, far from being a Republic, was one of the most murderous and bloodthirsty tyrannies in human history. The People's Republic of China is another example of a base oligarchy calling itself a Republic.

There is another sense in which the term Republic is misused, namely to signify a division between executive and legislative powers in a constitution. Some claim that with such a division any constitution is a Republic and that those without it are all despotisms.¹⁸⁰ We shall examine this in greater detail later. It is necessary here merely to note these incorrect uses of the term Republic, (and despotism) and reaffirm the sense in which it shall be used henceforth. We shall use the original definition. A Re-

¹⁷⁹ An American Court even used the term thus in *In re Duncan*, 139 U.S. 449.

¹⁸⁰ Kant, *Kant's Political Writings*, Part IV, Perpetual Peace, 'A Philosophic Sketch.' Note that Montesquieu denominates the functional division or mixture of executive and legislative power as liberty and tyranny, respectively, a convention which we shall seem to observe. What we mean, however, is that such mixtures are tyrannical, not that they actually form a corrupt Monarchic constitution. See Montesquieu, *The Spirit of the Laws*, Part II, Book XI, Chapter VI. Montesquieu's use of the term Republic is equivocal, however, meaning either Democracy or Aristocracy (Part I, Book II, Chapter II). Hence, it is highly suggestive of participatory government, but it falls short of indicating a representative government.

public is a mixed constitution containing a democratic element, usually a representational Democracy, be it double or triple mixed, and a Despotism is strictly the perverted rule of one.

Finally, we ought not to confuse the term Republic with Federation, which we will also investigate later, for the layered appearance of the representative structure often found in republics is suggestive of that found in a federation, between its central authority and member states. We must not confute them on this account. The Republic and the federation contain crucial differences. For example, the distinguishing element of a Republic is the presence of a democratic element, usually in the form of elective representatives who govern on behalf of the people as a whole, whereas a federation need not have any democratic element.

Now, Republics can be more democratic or aristocratic depending on the nature of their representatives and the people's role in making, adjudicating and executing laws. If representatives are elected or determined by lottery, the Republic will be on the balance more democratic, whereas if they are appointed by various groups, factions, geographic areas, or on an hereditary basis, the Republic will incline more towards aristocracy. For example, the Roman Republic featured an aristocratically dominated popular election of Censors, who then appointed a Senate based on traditional criteria.¹⁸¹ In this respect it was relatively aristocratic, as the Senate was only indirectly elected, whereas the United States is more democratic as its Senate is directly elected by the people.¹⁸² However, law was not formally made by the Roman Senate; the Roman people usually voted on the adoption or rejection of laws proposed to them by directly and indirectly elected magistrates. In this respect, the Roman Republic inclined more toward democracy than aristocracy. By contrast, United States laws are not put to the people as plebiscites, but rather determined exclusively by elected officials. In this respect, the American Republic is rather more aristocratic than was the Republic of Rome. As these examples show, Republics can be either more democratic or aristocratic depending on the people's role in making, adjudicating and executing laws

One method of balancing both aristocratic and democratic elements in the Republic is by the adoption of a bicameral legislature, wherein one group of representatives is democratically selected and the other is determined aristocratically. If such is done and each chamber exercises an equal power, the aristocratic and democratic elements of the Republic can be brought into balance, all other things being equal. This formula was adopted by the United States in the Constitution of 1787, but was discarded in favor of a democratic election formula for both chambers by the 17th Amendment. The original method of selecting Federal Senators was by vote of each state legislature, making the selection process relatively aristocratic, whereas Congressmen were elected by popular vote from predetermined districts. There are other reasons which support the adoption of a bicameral legislature, namely to decentralize legislative power and to better synchronize election cycles. These topics, however, must wait until later.

The task of balancing the aristocratic and democratic elements naturally suggests dividing the legislature into two chambers. Little attention is paid, however, to whether four or five chambers might not be even better. This is because there are not

¹⁸¹ See Generally, Lintott, *The Constitution of the Roman Republic*.

¹⁸² After the 17th Amendment, as discussed shortly.

four or five per-capita elements to be balanced. However, there may be reasons why a third chamber might be quite beneficial, particularly as legislation becomes so weighty and complex that the legislatures begin delegating legislative power to agencies, which then proceed to make law in place of the legislature, beyond the reach of the electoral system. When agency rulemaking becomes the primary source of legislation and the legislature itself assumes the role of mere dispatcher, the legislative power can indeed be viewed as already poly-cameral, such additional chambers being extraordinarily aristocratic. The formal provision for a third chamber in the written constitution may be a means of remedying such explosions of legislative license. However, the device of administrative agencies and their abuse will be looked at more deeply later.

THAT MIXED CONSTITUTIONS ARISE IN RESPONSE TO EXTREME POLITICAL COMPULSION, AS THE EXAMPLES OF ROME AND ENGLAND PROVE

Let us examine four instances of a mixed constitution's birth, namely the founding of the city of Rome, the establishment of the Christian church, the acceptance of the Magna Charta, and the creation of the American Federation, so we may appreciate the political necessities which give rise to such governments. From this sampling it should become clear that mixed constitutions arise in response to extreme political compulsion. They are not the offspring of tranquil times.

According to legend, Rome was founded on hills overlooking the Tiber river by Romulus. It was a fortuitous location, but early Rome was a city of bachelors. Neighboring tribes, alarmed at the prodigal growth of Roman power, sensibly refused to permit intermarriage with their own citizens, hoping thereby at once to recruit their own strength and thwart that of their overachieving neighbors. The lack of women motivated the Romans to steal wives by national stratagem. They conspired to host a summer harvest festival which by its opulence would attract most of the neighboring tribes, whose maidens could then be seized by the Romans. This design was carried out in what is still known as the "Rape of the Sabine Women," though other tribes besides the Sabines lost maidens to the indiscriminate Roman bachelors.¹⁸³

Ironically, this seizure occasioned a war which ended in the wedding of the Roman and Sabine governments. This fusion helped bring to Rome a mixed constitution which lead it to the pinnacle of world power. The capture of the brides sparked a war, for no sooner had the seizure taken place than did the fathers and brothers of the kidnapped maidens attack Rome. The Romans handily defeated the first three waves of neighbors, who in their unbalanced haste can almost be said to have defeated themselves. The Sabine attack was more formidable than those of the other neighbors, however, and drove the contest to the precincts of Rome itself. After a fray in which the tide turned this way and that, the women, experiencing the horrible calamity of becoming at once both widows and orphans, interceded in the mutual slaughter of husbands, fathers and brothers and persuaded each side to abandon the blood-bath.¹⁸⁴

¹⁸³ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapter IX.

¹⁸⁴ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapter XIII.

For each party, the conquest of the other was incomplete, each was provoked but not fully vanquished, rendered hostile, but not entirely subdued; and yet each was now ensnared by filial ties with the other. A conventional solution seemed impossible. So, out of desperation, the Sabines were invited to share the Roman government. Their king was to enjoy a lifelong co-equal power with Romulus, and the prominent families among the Sabines, together with those of Rome, would be represented in an advisory body to be called the 'Senate'.¹⁸⁵ In this manner the wedding of the governments followed the wedding of the maidens. After the death of the Sabine king, the Senate remained, giving Rome an embryonic mixed constitution blending the Kingship of Romulus with the Aristocracy of the Senate.

This mixture, although incomplete as merely a dual blend with a preponderance of Monarchy, provided a sturdy base upon which the young nation could grow. The replacement of the Kings with elected Consuls and magistrates, plus the creation of the People's Tribunes added the crucial third element of Democracy to the Roman constitution, particularly as the tribunes represented the plebeians, the people at large, and gave voice to the popular will.¹⁸⁶ These constitutional changes were the products of compulsion as well. For example, the Tribunes were instituted only after of the whole people of Rome threatened secession.

This mixed constitution was imposed upon a people whose social character was so replete with skill and dedication that they ultimately became the masters of the world. Judging by the results, it is not rash to opine that the Roman Republic exhibited the most singular coefferency of political virtue and human diligence the world has ever known.¹⁸⁷ As this example shows, the advent of the mixed constitution in Rome was preponderantly the product of circumstantial necessity. Nor did this mixed constitution fade as Rome grew, but as Polybius relates, the mixed constitution became even more pronounced, especially in the face of the disastrous first years of the Second Punic War:

...[The Roman Republic] was at its best and nearest to perfection at the time of the Hannibalic war...The three kinds of government [monarchy, aristocracy, and democracy] all shared in the control of the Roman state. And such fairness...in all respects was shown in the use of these three elements for drawing up the constitution and in its subsequent administration that it was impossible even for a native to pronounce with certainty whether the whole system was aristocratic, democratic, or monarchical...for if one fixed one's eyes on the power of the consuls, it seemed completely monarchical and royal; if on that of the senate it seemed again to be aristocratic; and when one looked at the power of the masses, it seemed clearly to be a democracy.¹⁸⁸

¹⁸⁵ Cicero, *De Republica*, Book II, Part VIII. But see Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book IX 9 and 13.

¹⁸⁶ Machiavelli, *Discourses*, Book I, Chapter III. There were memorable instances of tribunes siding with the Senate, however, in derogation of their *raison d'être*.

¹⁸⁷ Longevity alone, however, places that glorious Republic's achievements above those of the Respondent's Republic, for the United States has exhibited a profusion of excellence and achievement already sufficient to make her unforgettable to the annals of human history, though she is by comparison still in her infancy.

¹⁸⁸ Polybius, *Histories*, Book VI, Chapter XI (Polybius' Chapter V).

The rise of the early Christian Church in Imperial Rome affords yet another example of a mixed constitution arising from circumstantial constraints. The Church rose in response to the tyrannical rule of the Julian line. As Gibbon explained, the structure of ecclesiastical government was a primary cause of Christianity's rapid growth.¹⁸⁹ The early Christians were able to find in their ecclesiastical assemblies the voice and sway which they were denied under the secular tyranny of the Caesars. A local church offered even the lowliest individual both the freedom of speech and the avenue of public enterprise which the Imperial government placed institutionally beyond their reach. Upon this base of popular activity, in direct response to the suffocating and hostile circumstances pressed upon them by the Roman Government, the Christians developed a mixed constitution. From the churchgoing laity there were elected clergy, these denominated as Presbyters, a term indicating their age, gravity, and wisdom, differing but little from the older term Senator. To these officers were entrusted the management of the congregation. From among the Presbyters was selected one, preeminent in wisdom and holiness, styled Bishop, to exercise a perpetual magistracy as ecclesiastical governor. Thus did the early congregations form mixed constitutions containing the popular rule of the laity, a senate composed of Presbyters, and the monarchic office of Bishop.

That such development was the result of secular persecution is proved by the fact that the freedom and equality which marked the early ecclesiastical constitution declined precipitously as Christianity gained the formal acceptance of the Roman Imperial Government. The triumph of the Christian ideals among the Romans was coeval with the indiscriminate abandonment thereof by the Bishops, for whom the principles of Christianity gradually became objects of celebration rather than emulation, and the offices of ecclesiastical authority, mechanisms for profit rather than salvation. The official sanction of Christianity supplied the Bishops with sufficient power and prestige to subvert the triple constitution which had flourished in the more oppressive climate. This is only natural, as the organic power of the congregation is easily overbalanced by that of a Bishop who enjoys the active support of an extensive tyranny. Thus, the nativity of the Christian church shows that mixed constitutions arise from politically compelling circumstances.

The British Isles found their opportunity to enjoy a mixed constitution in a single afternoon, when King John's English expedition against Poitou was defeated by King Philip at Bouvines.¹⁹⁰ Upon this reverse, King John found his English treasury depleted from conflict with the French, his territory of Normandy lost, and critically, his barony taxed and encumbered to the brink of revolution. He was constrained by the precarious tenure of his crown to compromise with the wishes of the united barons and give them a portion of the power which heretofore had been exclusively his own. This transfer was detailed in the great charter, signed in the meadow at Runnymede in June of 1215 A.D. On that day and through that instrument was created a body of twenty-five barons, to serve together to deliberate and enforce the procedural and substantive rights described in the balance of the charter.¹⁹¹ Thus arose among the English speaking peoples a mixed constitution of Kingship and Aristocracy. This is not to say that the aristocratic power did not predate the charter, only that it was latent

¹⁸⁹ Gibbon, *Decline and Fall of the Roman Empire*, Chapter XV, Part V.

¹⁹⁰ Churchill, Winston. *A History of the English Speaking Peoples*, Book II, Chapter XV.

¹⁹¹ Article 61 of the *Magna Charta*.

and unofficial. Indeed, under baronial feudalism, the barons were agents of the king, and were legally obligated to serve the king's interest rather than exert a countervailing authority against him, though they naturally did exert just such a contrary pressure. The Magna Charta established the legality of this contrary power. The seizure of power under the charter was thus the incarnation of an organized and determinate Aristocratic element in the English constitution. As was the case in Rome, the mixed constitution in England was the result of straightened circumstance.

THAT THE MIXED CONSTITUTION IN AMERICA ALSO AROSE IN RESPONSE TO EXTREME POLITICAL COMPULSION

As in Rome and England, the mixed constitution came to the shores of the new world by necessity, not design, there being a vast gulf of time and space between a mixed monarchy in one portion of the earth and a struggling throng of subjects in another. This happy circumstance placed the North American colonists in a predicament which necessitated the creation of local and autonomous political institutions, expedients which supplied the deficiency of leadership left by the distant English regime during the daily crises of the early colonial settlements.

The first decades of colonization proceeded upon the political organizations stipulated in the colonial charters, documents which were as amenable to democratic extrapolation and improvisation as they were to monarchic restraint. The charter of Massachusetts, for instance, stipulated that the Governor was "empowered to make laws and ordinances for the good and welfare of the said company," so long as such were "not contrary or repugnant to the laws and statutes of...England."¹⁹² The phraseology provided a vast discretion, made all the wider by the common law courts soon to be established in the colonies, which were certain to construe both the charter and the laws of England with every concession to practicality. The charter also established a general court, composed of the officers and freemen of the colony, and also a court of assistants, smaller than the general court and composed of the governor, deputy governor and several assistants.¹⁹³ These charters thus established a species of mixed constitution from the outset, an Aristocracy of the corporate leaders, governing in the place of the king but far beyond the horizon of the king's thought, checked by the influence of all the freemen in and through the general court.¹⁹⁴ The charter of Virginia, first obtained from the hand of Queen Elizabeth by Sir Walter Raleigh, contained a correspondingly profligate allowance of liberty. Indeed, Jefferson lamented the progressive debasement of those original liberties as at once the hallmark of tyranny and a seedling of the American revolution.¹⁹⁵ Thus from the outset were liberal governments and mixed constitutions introduced into the colonies, forming uncomfortable and incongruous accessions to the domains of a distant and decadent parliamentary Monarchy.

The Crown's use of the colonial charter established new settlements so firmly as to render them both self-sufficient and impatient with servitude. It was critically nec-

¹⁹² *Charter of Incorporation*, Massachusetts Bay Company, 1629.

¹⁹³ Friedman, *A History of American Law*, Chapter I.

¹⁹⁴ Compare this with the short-lived system of feudal tenures introduced into the Hudson river valley by the charter of New Netherland.

¹⁹⁵ Jefferson, *Notes on the State of Virginia*, query XIII.

essary to send colonists to new lands under flexible charters, for none could predict in advance the perils which would arise in strange lands, and investors could not otherwise be induced to undertake the projects. The result was economic freedom and a mixed constitutional basis for the new settlements. This virtually insured that the colonial governments would grow apart from the mother country, as their initial corporate charters were more republican than monarchic, their laws and ordinances sui-generis, unrestricted and forged under the weight of popular pressure. The colonies therefore grew strong and independent under republican capitalism, totally unfit for political subordination to a Monarchy.

The colonial charters were nominally economic instruments, but in reality they were political structures. The Crown did not understand that *economics is politics*, and that the freedoms extended to the one field are thereby established in the other. The Crown and the capitalists it sponsored saw little but the economics of their projects; they did not perceive that they were creating autonomous and eventually powerful political communities on a basis adverse to the Crown. True, the religious colonists in Massachusetts and Pennsylvania were very aware of the political nature of their establishments. But these colonists were a political nuisance at home, and the political consequences of their departure seemed a benefit rather than a political sacrifice. That their development was adverse to Britain and its state religion was considered both obvious and inconsequential.

This adverse colonial trajectory did not cause alarm until much later. The British government had little interest in the American colonies for the first full century of their existence; an attitude immediately convenient but ultimately fatal to British national interest. Meanwhile, the colonists were forming a democratic spirit, guided by the faintest British principles, which they applied with a creativity and license which eventually coalesced into a distinct political orientation far removed from the strictures of English Monarchy.

The evolution of a democratic spirit in the colonies was augmented by other causes as well; the colonists were largely of the same economic class, and natural circumstances contrived to promote such equality as the colonies grew.¹⁹⁶ The supply of land was vast. A freehold was within reach of nearly everyone, leaving no scarcity or monopoly of realty upon which a traditional agrarian Aristocracy could be erected. Most critically, the colonies' underdevelopment necessitated a brisk and ceaseless commerce, which helped place in abeyance the mercantilism and restraints of trade which hamstrung the European economies. The incumbency of liberty for commerce shall be examined more closely elsewhere, but we must here recognize that the tremendous commercial intercourse of the colonies served to strengthen and solidify their democratic spirit, long before that spirit manifested itself into the edifice of a formal independent liberty.

The North American colonies became important to their English master in proportion to their wealth and power, which is to say, in proportion to their ability to despise him, and within a brief span of time the de-facto states flourishing in North America confederated with a purpose to do entirely without the interjections of a myopic and distant tyranny.¹⁹⁷ This tottering confederation, erratic and indeterminate as it originally was, embodied a federated mixed constitution, being a union of smaller

¹⁹⁶ See De Tocqueville, *Democracy In America*, Part I, Chapter 2.

¹⁹⁷ See Kent, *Commentaries on American Law or Lectures*.

independent Republics. It was representative, and thus partook of the rule of the few, essential Aristocracy, but as the representatives were themselves subject to the will of the peoples within each independent state, the presence of the Democratic element made itself felt as well. It was thus, as in Rome and England, that exigency produced a mixed constitution. Though the power of this frail combination was far inferior to the might of the Empire from which it would break, it proved superior to the residuary fraction of Imperial resources cast in its way, mishandled and squandered as these were by the combined incompetence of Aristocratic generals and an unenlightened Government.

Thus, the confederate colonies were able to slip out from under the yoke which had never been fully fixed upon them. It was this escape that permitted the structuring of a regular government among the colonies, a feature conspicuously absent during the period of nominal membership in the English empire. The product of this effort was ultimately a constitution establishing a federation among the former colonies, wherein the Aristocratic, Monarchic, and Democratic elements were balanced with remarkable prescience. The mixture of the pure constitutions was the result of emergency, the child of political constraint, as it had been for Romulus, the Christians, and King John. It is often said that the American state was the first nation planned and conceived anew, freshly upon principles and designed as a whole. This is not incorrect, but it ignores the fact that this mixed constitution was the product of hardship, extremity and outrage in the colonies. It invites the incorrect assumption that mixed constitutions are derived from thin air, that no political coercion or constraining circumstance is required. On the contrary, it is clear that a mixed constitution is usually a product of political pressures, the happy result of force.

THAT MIXED CONSTITUTIONS ARE EXCEPTIONAL, AND NOT THE TYPICAL OFFSPRING OF EXTREME CIRCUMSTANCES.

Let it not be supposed, however, a mixed constitution is the *typical* offspring of extreme circumstances. The reverse is by far the more common result of civil strife, and should we deign to adduce every such example, they might be multiplied indefinitely to no purpose but universal frustration and despair. The revolutionary cycles of the pure constitutions prove this. The destruction of a corrupt constitution has oftener resulted in a fresh miscarriage than a renaissance of justice. This was born out most clearly by the experience of Imperial Rome, which as we have already noted, suffered no less than *thirty-four* tumultuous successions of tyrants in a one-hundred year period, A.D.192 through A.D.292.¹⁹⁸ As in Rome's case, a constitution may fall into dysfunction countless times without evolving into a mixed constitution. In fact, extreme circumstances usually do not produce a mixed constitution. We may also consider the twin examples of the English Revolution of 1642 and that of the French in 1789. The English revolution produced no mixed constitution, for Cromwell's power became absolute, nor did the French, which produced a succession of oligarchies culminating in the despotism of Napoleon. Thus, we must bear in mind that mixed constitutions are exceptional and not the typical offspring of extreme circumstances.

¹⁹⁸ Bunsen, *A Dictionary of the Roman Empire*, Appendix I.

It might be objected that Canada and Australia attained mixed constitutions without any extreme circumstances. Upon closer inspection, however, these cases also appear to have arisen from extremity. In one sense, both can be seen as consequences of the American victory in the Revolutionary war, which went far to convince Great Britain that self-rule for its English-speaking colonies was desirable, if not unavoidable. Second, both governments were built upon the power structures already in place, and these were the British structures bearing the stamp of mixed government, derived from the extreme circumstances of earlier British history. Thus, a glance into the past reveals that even the seemingly peaceful attainment of mixed constitutions in Canada and Australia were rooted in the extreme circumstances of British politics and history.

**THAT THE POPULAR, ARISTOCRATIC, AND MONARCHIC
ELEMENTS ARE ALWAYS PRESENT IN ALL SOCIETIES,
BEING MERELY LATENT AND REPRESSED
WHEN NOT OPERATIVE**

For convenience we have thus far described the pure constitutions as if the other two elements were simply gone. This is actually not the case, as they are merely latent and repressed when not functional. A pure democracy is a state which actively suppresses its aristocratic and monarchic elements. The same is true for a pure Monarchy. Its democratic and aristocratic elements are simply held down. These suppressed elements still exist, however, and are a latent power in waiting, like a spring coiled up and held back by some greater power.

This is the real source of injustice in the single constitutional format. For a constitution to be single, one element must by nature oppress and suppress. This causes injustice to the suppressed elements, which eventually revolt and suppress in turn. Now we are in a position to understand the actual mechanism of the constitutional cascade. The dominant element naturally suppresses the other two, provoking a reactionary revolution, a cycle which repeats itself until this repression is impossible. The cycle terminates when two repressed elements revolt and find themselves then equally matched. In their mutual competition, they revive the lately overthrown element, each with its aid to prevail over the other. If this revival is complete enough, the third element will compete against both in its own right, and the triple-mixed constitution emerges, balancing monarchy, aristocracy, and democracy against one another.

Therefore, wherever tyranny prevails, there are sure to be democratic and aristocratic forces lurking, repressed and waiting for the opportunity to assert themselves. In order to remain dominant, then, an element must constantly re-conquer and re-weaken its suppressed elements, or they will return to overthrow it. This is life of the single and mixed constitutions, as governed by the natural inclinations of people towards competition and 'aristocratization,' about which we will discuss more later on.

THAT CONSENT IS THE DEMOCRATIC ELEMENT IN MIXED CONSTITUTIONS, AS WELL AS A COMPONENT OF LEGITIMACY

Since consent first makes its formal appearance in the mixed constitution, principally the Republic, we may take this opportunity to understand it more fully. Consent is usually believed to legitimate government action. This is not wrong, but it misses the most important point, for consent is the democratic element in a mixed constitution. When a constitution features consent structures of any kind, it is automatically a mixed constitution, and through these consent structures flow the forces of its democratic element.¹⁹⁹ The popular idea that consent is a prerequisite for legitimacy merely means that legitimate government is thought to require a democratic constitutional element of some kind. Keeping in mind that consent is the democratic element of a mixed constitution, let us further explore the relationship between consent and legitimacy.

The idea of consent as a foundation of political legitimacy shifts the focus from the justness of a law to justness of the *lawmaker*, and in doing so, calls into question the nature of sovereignty, asking whether it can legitimately exist apart from the consent of the individual. Sovereignty has been the object of many a jealous design; kings have claimed it by divine right, revolutionaries upon arguments of merit, conquerors on the basis of raw power. It is, however, none of these things. Rather, sovereignty was best explained by Rousseau, who reminded that each individual exercises an indefeasible dominion over themselves, which in aggregation forms the sovereignty of a state.²⁰⁰ Under such a theory, popular consent is the only mechanism whereby a government can exercise any legitimate sovereignty, as the term itself equals the collective will of the people. A paradigm therefore arises under which the consent of the governed and self-determination stand irrevocably on the side of legitimacy and all other political forces stand against it.

Before Rousseau, Locke clarified that governmental sovereignty was merely the accumulated sovereignties of individuals, held in agency upon good behavior by the chosen government.²⁰¹ This collective sovereignty is formed by the aggregation of individual sovereignties, each being inalienable but by a species of loan, whereby the recipient government became at once fiduciary and debtor, repaying the individual by provision of liberty and safeguard of welfare. Locke's agency theory of legitimate government reinforces the idea that only the consensual transfer of sovereignty by the individuals, as principals, to the government, as agent, can create legitimate government sovereignty. This establishes governmental sovereignty as a borrowed power, existing through the consent of its indefeasible owners. The government's sovereignty is thus held upon the same tenure as a bailiff, and by simple obversion, if it is held in any other more independent manner, such is a divestiture of the individual's inalienable sovereignty and therefore a theft of freedom.

Such consent structures are usually presumed to be electoral. It is important to note, however, that consent operates outside the context of elections, for it is also the

¹⁹⁹ Unless there are nothing besides consent structures, in which case a pure democracy is arguably present, not a mixed constitution.

²⁰⁰ Rousseau, *The Social Contract*, Book II, Chapter I.

²⁰¹ Locke, *Second Treatise on Government*, §§ 221-222.

basis of community customs and the common law. As we noted earlier, the common law is that body of community customs and usages which, although never written in statute or legislative act, have gradually received the sanction of courts over the centuries. For example, a community might habitually travel down certain narrow roads in one direction only, in order to avert the inconvenience of accidents and traffic jams. When courts observe and enforce such customs, they are said to be applying common law. Thus, common law is made by the whole society in its gradual formation of customs and habits, and thus it is a manifestation of their consent. Such common law 'legislation' also is a manifestation of the democratic mechanism of consent. We have also already noted that the judicial recognition of people-made common law is useful for several reasons, all of which inure to the stability and efficiency of government. Having reviewed neither the democratic constitution nor the role of Democracy in mixed constitutions, we could not at that point elaborate on the stabilizing benefit of the common law. But now it should be clear that when a common law jurisdiction is established, the democratic element in a constitution is augmented, for it permits formal lawmaking directly by the people on the basis of their time-tested consent.

Therefore, common-law lawmaking is quintessentially democratic. That a judge actually 'applies it to the people' blends it with aristocratic power. This is necessary, for as we have seen, those who make law must not be permitted to apply it, for injustice results from the concurrent power to exercise both corrective and distributive justice. The presence of common law in a judicial system also entails a sharing of distributive, or legislative, power between the legislature and people, empowering the latter at the expense of the former. Therefore, the use of common law in a mixed constitution makes no difference from the judiciary's point of view, for it retains its monopoly on corrective justice and will apply the law from either source, the people's common law or the legislature's statutes. Thus, the adoption of common law spreads legislative power between the legislature and the people, but is a wash for the judiciary.

Now, this ideal is compromised to an extent because the common law is by nature more vague than statutory law. As a consequence, judges may surreptitiously legislate by virtue of the increased latitude for interpretation inherent in vague laws. Thus, the use of a common law system may provide the judiciary with a chance to usurp the legislative power of the people, inherent in their right to develop common law. We shall focus on this judicial usurpation in greater detail later. For now, we must note that consent is the mechanism of the democratic element, and it operates in *both* the election of representatives and in the formulation of common law.

THAT CONSENT HAS ALWAYS BEEN FUNDAMENTAL TO POLITICAL LEGITIMACY, THOUGH SUCH HAS BEEN POPU- LARLY ADMITTED ONLY SINCE THE ENLIGHTENMENT.

Respondent contends that its abandonment of various consent structures is just, since natural law always justifies doing what is wise, whether consent exists or not. Respondent further points out that the classical theorists we have mentioned similarly despised consent. Respondent is right in contending that under natural law, as the ancients understood it, wisdom ultimately overrode consent. But Respondent is wrong

to suggest that consent is irrelevant now or that it was so to the ancients. Consent has always been fundamental to political legitimacy, though such has been popularly admitted only since the enlightenment. Classical natural-law theory indeed recognized the importance of consent, although only as a practical necessity for rule of the wise.

Consent is a modern basis of legitimacy. Enlightenment political theorists outlined the role of consent in politics by positing social contract theories, conjecturing of times when the birth of society featured individuals consenting to join together. Hobbes, Locke, and Rousseau proceeded in this fashion. The ancient theorists, on the other hand, understood consent in the context of ongoing societies, not merely at the moment of political birth. As mankind normally experiences himself within pre-existing societies, the ancient theories, rather than those of the Enlightenment social contractors, provide the most experientially compelling support for modern consent-based legality.

The most illustrious ancient theory linking consent and legality is that of Socrates. As recounted by Plato in the *Apology*, Socrates willfully suffered the Athenian death penalty because he had consented to the laws of Athens throughout his adulthood, and although he was allowed to help make or change them as a member of the Democracy, he had permitted them to remain as they were. His consent bound him, in his mind, to submit to the death penalty even when offered an easy escape.²⁰² Socrates insisted that his opinion in the matter was non-debatable. This suggests that for Socrates, it was a premise beyond need of proof; it was self-evident. Thus, Socrates traced the line of legitimacy around the contours of consent.

Socrates' theory of consent-based legitimacy was short-lived. It evaporated quickly in the advent of Platonic and Aristotelian political theory, which anchored the notion of justice in the good, and fastened legitimacy to that beacon rather than to mere consent. As we shall see, Plato established a political theory in which the only legitimate basis for leadership was wisdom. Aristotle seconded the idea, concluding that the wise naturally led the ignorant, as in the master-slave relationship. Thus for Plato and Aristotle, wisdom, not consent, was by nature, by *natural law*, the true basis of political power.²⁰³ In this manner, Socrates' theory of consent-based obedience gave way to Plato and Aristotle's formulae of political compulsion based on true wisdom. There was little room in this natural-law regime for consent-based government. Wisdom-based political legitimacy was considered a *law of nature*. As Strauss explained, Plato and Aristotle believed that:

the best regime [was] the rule of the wise...[and] it would be...absurd to hamper the free flow of wisdom by consideration of the unwise wishes of the unwise; hence, the [truly] wise rulers ought not be responsible to their unwise subjects. To make the rule of the wise dependent upon election by the unwise or consent of the unwise would be to subject what is by nature higher to control by what is by nature lower, i.e. to act against nature.²⁰⁴

²⁰² Plato, *Apology*, 41A. , Socrates was accused and convicted of worshipping false Gods and corrupting the youth by a jury of 501 Athenians in 399B.C., for which he was given the death sentence and executed.

²⁰³ Aristotle, *Politics*, Book I, Chapter III, at 1253b1

²⁰⁴ Strauss, Leo, *Natural Right and History*, Chapter IV.

Jurists like Stephen and Maine were likewise aware of this natural law-based rival to consent-based sovereignty. Justice Stephen, in his *Criminal Law of England*, explained the two antithetical bases of sovereignty thus:

Two different views may be taken of the relation between rulers and subjects,...[one in which] the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population,...[and one in which] the ruler is regarded as the agent and servant, and the *subject* as the wise and good master, who is obliged to *delegate* his power to the so-called ruler because, being a multitude, he cannot use it himself...²⁰⁵

Thus, for Plato and Aristotle, and the next thousand years of Western political tradition, legitimacy was political power exercised by the truly wise, a natural law. It was seen as naturally just, despite the subjects' possible objections. This theory, derived from the natural right of the wise to rule the foolish, renders consent theoretically irrelevant and even damaging to pure justice, as Respondent has suggested.

Respondent goes too far, however, in assuming that consent played no role at all in classical political theory. Adopting the classical theory of natural law is not to eliminate consent entirely, but rather to relegate it to a minor role. The rule of the wise, although naturally just, is not practical, as the ancients conceded, for the wise are a small minority and cannot lead the many unwise by force. They must somehow obtain the consent of the unwise masses in order to lead at all. Moreover, the wisdom of leaders is usually debatable, and to insure their wisdom they must be questioned and subjected to the people's constant oversight. For these reasons, consent must bear upon the rule of the wise for their rule to become a practical possibility.

Consent is therefore fused into the system of classical natural right by these twin streams, both practical, that the few wise cannot lead the stronger masses but through consent, and that the masses cannot verify the leaders' wisdom but by consent-based machinery. The machinery posited was the mixed constitution, essentially aristocratic and monarchic repositories of political wisdom duly checked by popular consent. This allowed the rule of the wise to endure together with consent of the governed, thereby solving the political riddle of practical Meritocracy.²⁰⁶

For these reasons, we hold that even the classical natural-law theory recognized the importance of consent, although only as a practical necessity for rule of the wise. Plato implies this idea when he suggests that in a sober city, "the rulers and the ruled are of one mind as to who ought to rule."²⁰⁷ Classical natural-right was the rule of the wise, with consent a minor support. Modern 'egalitarian' natural-right revolves around consent, with *wisdom* a minor support. Thus, Respondent cannot escape the duty to respect consent by retreating into natural law and citing classical political theory.

²⁰⁵ Main's *Popular Government*, Essay I, directly quoting Stephen's *History of the Criminal Law of England*, ii. 299. (Italics Supplied).

²⁰⁶ See Generally, Strauss, Leo, *Natural Right and History*, Chapter IV.

²⁰⁷ Plato, *Republic*, Book IV, 431 E.

THAT THE CONSENT DOCTRINE CHANGED DURING THE ENLIGHTENMENT

There are recent thinkers who make the relationship between consent and legitimacy so clear that even had Respondent succeeded in its claim regarding classical consent, we would still find its abandonment of consent unjust.

Despite its relative dormancy during the middle ages, consent continued quietly to exert its influence over the legitimacy of laws, and when the mixed constitutions re-appeared, most notably in England after the Magna Charta, the gradual equation of legitimacy with consent rose with them, albeit in stark contrast to the absolutism which was playing out in continental Europe. This connection between consent and legitimacy was all the more dominant in those states which entered larger confederations and leagues, for consent forms by nature the basis of such entities. Thus, not only in England, but in the budding confederacies in Europe and the New World, including the Helvetic Confederacy, the United Netherlands, the German Confederacy, and the United Colonies of New England,²⁰⁸ the link between consent and legitimacy was increasingly brought into the popular consciousness.

After its original exposition by Socrates and long subsequent hibernation, the consent basis of legitimacy finally burst into its own during the turbulent era of enlightenment Europe. Today, the enlightenment social contract theories provide the overwhelming majority of popular theoretical support for consent-based legality. As we have already noted, Locke held that the sovereignty of government is merely the accumulated sovereignties of individuals, held in agency and upon good behavior by the chosen government.²⁰⁹ Locke's agency theory of legitimate government forces the inference that only by the consensual transfer of sovereignty by the individuals, as principals, to the government, as agent, can a government's sovereignty be legitimate. Governmental sovereignty is a borrowed power, existing by the consent of the real owners of that sovereignty, the people. In Locke's words:

To understand political power and right...we must consider what state all men are naturally in, and that is, a state of perfect freedom...A state also of equality...equal one amongst another without subordination or subjection.²¹⁰ If man in the state of nature be so free...why will he part with his freedom...and subject himself to the dominion and control of any other power? [Because] though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others...This makes him willing to quit a condition which, however free, is full of fears and continual dangers, and...join in society with others...for the mutual preservation of their lives, liberties and estates...²¹¹ The power of the [resulting] legislative, being derived from the people by a positive grant and institution, can be no other than what the

²⁰⁸ Kent, *Commentaries*, 13th Ed. Book I, Part I.

²⁰⁹ See Generally, Locke, *Second Treatise on Government*.

²¹⁰ Locke, *Second Treatise on Government*, at Chapter II, § 4.

²¹¹ Locke, *Second Treatise on Government*, at Chapter IX, § 123. (Original Italics Removed.)

positive grant conveyed²¹²...These are the bounds which the trust, that is put in them by the society, and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government.²¹³

In summary, the modern political theorists of the Seventeenth and Eighteenth centuries resolved the riddle of consent and legitimacy by positing the natural residence of sovereignty within the individual, upon which an agency theory of government allowed for a representational system and constitutional superstructure, outwardly resembling that of the ancients, but founded upon the inalienable rights of the individual. Thus, the ancients and the moderns both adopted the same mechanism of consent, the ancients because it was practical and the moderns because it accommodated the inalienable, transcendental rights of the individual.

THAT REPUBLICS ACTUALLY BLEND MERITOCRACY WITH DEMOCRACY, UNITING THE ANTITHETICAL PARADIGMS OF ‘CONSENT BY THE GOVERNED’ AND THE ‘RULE OF THE WISE’.

Modern and ancient political theory each fall short of the truth. Modern political theory is based on the consent of the governed, and ancient, on wisdom. But, *without both consent and wisdom*, there can be no enduring legitimate sovereignty in any political context. This duality underlies the genius of the Republic, which effectively blends aristocratic wisdom and democratic consent. The Republic unites opposing theories of political legitimacy: the *wise* rule through the elective *consent* of the people.

The innermost secret of the Republic is that it is not just a coincidental blend of Meritocracy and Democracy, but that the Republic is the outward manifestation of the fact that these two terms are united in perpetual symbiosis. *Without both consent and wisdom*, there can be no enduring legitimate sovereignty. We have already noted that the rule of the wise and the rule of the people are antithetical, and this remains true. However, we also recognized the subtle fact that Democracy surreptitiously uses meritocratic structures such as elections in order to prevent a degeneration into anarchy. We have also seen the inverse, for Meritocracy cannot exist but through the employment of democratic, consent-based systems. Each regime is actually sustained by structures rooted in the other. As ends, Democracy and Meritocracy preclude each other. But with regard to means, each employs the other. Meritocracy is always sustained by democratic structures, and Democracy is always sustained by meritocratic structures. This is the deepest essence of the Republic. The Republic is highest architectionic manifestation of this symbiosis between Democracy and Meritocracy.

²¹² Locke, *Second Treatise on Government*, at Chapter XII, § 141. (Original Italics Removed.)

²¹³ Locke, *Second Treatise on Government*, at Chapter XII, § 142. (Original Italics Removed.)

THAT THE DEMOCRATIC IS THE MOST PEACEFUL MIXED CONSTITUTIONAL ELEMENT, BUT IT IS NOT SO PEACEFUL WHEN EXPANDED INTO PURE DEMOCRACY

When a triple-mixed constitution exists, we can compare the relative peacefulness of the three per-capita elements. When done, the democratic element appears intrinsically more peaceable than the aristocratic or monarchic. This is why mixed constitutions with democratic elements are slightly more prone to peace than others. But this is a fragile advantage which obtains only if capitalism is preserved in a healthy manner. In Rome, this advantage was destroyed by the superior economic advantages of war felt by the people. There are two causes of intrinsic peacefulness of the democratic element when housed in a mixed constitution. These are the diminution of military ability and martial desire which the triple-mixed constitution produces in the democratic element. Its ability is checked by the presence of the other two elements, which tend to dominate the war-making forces, but not compose them. The democratic element thus has more to risk in war and less to gain than the remaining elements. War will be fought by the people, but the benefits of victory, if any, will be divided among the elements. This unequal relation between effort and reward makes the democratic element more peaceful than the remaining two. But take away the remaining two, and there will be no such inequality. A pure democracy will result, and it will lose the peaceful character it possessed when merely an element of a greater government. This is because it will now be able to enjoy the entire fruits of a labor which it alone bears, not having to share them with any competing elements.

THAT CONSENT IN MIXED CONSTITUTIONS OPERATES PRIMARILY THROUGH ELECTIONS, THE STRUCTURE OF WHICH DETERMINES THE STRENGTH OF THE DEMOCRATIC ELEMENT

The democratic element, as we have seen, operates through consent. The most formal manner of expressing consent is through some kind of tabulation of opinions. In regard to political matters, this process is called an election. However, there are many ways to structure an election, and the various alternatives ultimately determine how powerfully the democratic element bears upon the rival elements of the constitution. We remind that there remain other areas in which consent operates, beyond that of elections, principally in the people's formation of customs, which in turn can be recognized by the judiciary and become binding on society as common law. Thus, the expression of consent is not limited to elections. However, for consent to be formally measured, an elective system must arise which insures an accurate determination. Such systems are invariably a product of competition between the rival elements of the constitution. Hence, some electoral systems will impede the consent power of the people while others will maximize it. This outcome is clear when one considers that the aristocratic and monarchic elements are typically at pains to establish electoral systems which co-opt or minimize the effects of popular consent, for this maximizes their own power. Conversely, the people always desire an electoral system that optimizes rather their power.

This said, one must not hastily conclude that the freer the election the more powerful the consent of the people becomes. There is a point beyond which the freedom of an election destroys the peoples' consent power. Such is the case when, for example, ballots contain so many competing names and issues that no reasonably informed citizen can understand them, or when elections can be freely called so suddenly and so often that the people cannot practicably participate in them. Moreover, when candidates are free to be listed on the ballot multiple times as members of competing parties, or when parties are free to use the same names as one another, confusion will destroy the efficacy of popular consent. Thus, just as excessive democracy is anarchic, excessively free elections are anarchic as well. The inevitable result of such free-wheeling electoral confusion is that the most organized aristocratic or monarchic candidates prevail, despite the wishes of the people.

By offering such ultra-free elections, the aristocratic and monarchic elements can, while appearing magnanimous and liberal, actually neutralize the people's constitutional influence. From the outside, things will look for all the world like a thriving democratic state, but the consent of the people will have been rendered ineffectual and irrelevant.

Intricately structured elections, however, do not necessarily improve the people's consent power. Everything depends on the type of regulations adopted. For example, fundraising restrictions are popular among people who resent the aristocratic influence of money in elections. And yet, excessive fundraising restrictions often guarantee that only the wealthy or famous can get elected, robbing the people of their ability to elect the candidates of their own choosing. It is for this reason that one often sees aristocrats advocating campaign finance limits, for such laws often empower them more than the people.

The timing of periodical elections also affects the strength of the democratic element. If they are held in mid-winter, some sub-groups of the people, like the elderly, or mountain-dwellers, for example, may be unable to vote, as a practical matter. In such cases, the voice of the people would be constricted to the younger, more urban citizens. This problem can be easily solved by simple technology, like mail-in ballots, but the danger must be recognized in order for any solution to be implemented, which is why we mention it. Care must be taken to prevent seasonal warping of the people's voting power.

To maximize the democratic element's power, elections must ascertain the unadulterated opinion of the people as efficiently as possible. Election laws aid this objective by clarifying election issues and regulating the numbers and labels of candidates. Of course, such laws destroy consent if an issue is reduced to one side, or competing candidates are reduced to a single name, for in such cases the choice of the people actually is no choice at all. Therefore the presence of elections, even free elections, is no proof of democratic government. Only elections which effectively discover the real will of the people can result in effective democratic power. For the people, there is no difference between a ballot with only one name on it and a ballot with ten-thousand, or between one hundred elections per day and none at all. Real choice is defeated in each case, and their power flows helplessly into the hands of the aristocratic and monarchic elements.

Thus, there remains no question but that the power of the people must be maximized rather than retarded by the structure of election regulations. It has already been

explained why the democratic element is a crucial component of an ideal constitution. Moreover, we shall see in many different ways that the popular element is actually the weakest of the three elements. The people are never as organized and wealthy as the aristocrats. Were the people, in fact, more powerful than the aristocrats, for example, election laws might be a salutary method of bringing them back down into balance by retarding their ability to exercise effective consent. But, the people are intrinsically weak compared to the remaining elements, and thus elections must be structured so as to ascertain their real will as efficiently as possible. Only then can their aggregate power be brought up to that exercised by the aristocratic and monarchic elements and a triple-mixed constitution emerge.

THAT THE OPTIMUM CONSENT PERIOD IS ALWAYS LONGER THAN THE AVERAGE BUSINESS CYCLE.

Respondent points out that it has many elective structures and rigorous election laws, and by our analysis, it is therefore democratic and just. We cannot rush to that conclusion, however. We remind Respondent that where consent is concerned, the devil is in the details. Some consent systems are insufficient to bring the democratic force of the people to bear upon the remainder of the constitution. Consent may fall short of being politically effective in respect of either quantity or quality. Quantity concerns the number of occasions for popular consent, and quality concerns the efficacy of consent on those occasions. As there is a quantity that optimizes the quality, we will deal with quantity first. Regarding the number of occasions needed for optimal consent, Respondent has argued that the consent even of a previous generation of citizens is often sufficient. We disagree. We will address such ‘ancestral’ consent in much greater detail later, when considering the Respondent’s delegations of legislative power to administrative agencies. Here, however, we will preview our conclusions from that section regarding the minimum characteristics consent periods must have to empower effectively a mixed constitution’s democratic element. We concluded there that exercises of consent must be periodic and potential throughout the life of each individual, and that the consent of an ancestor was invalid as to any living citizen. This is not to say that consent must be exercisable at all times, but that it must be periodic without end, throughout an individual’s life. We will not restate the proofs of these axioms here, for they may be reviewed in their proper section.

As for now, we will look at what period or interval optimizes the exercise of consent. This answer is straight forward. Optimal consent requires a period which allows for both an informed choice and a rapid change. The former consideration argues for longer intervals, while the latter, shorter. Balancing these two factors will produce a period which optimizes the consent function of the people.

Consent is, as we have seen, the operative force of the democratic element in the mixed constitution. For consent to operate with best results, the people must have accurate knowledge of candidates and incumbent officials. Some knowledge of this kind may be obtained directly from the candidates and the media. However, the overwhelming preponderance of opinion concerning the quality of leaders will be by inference from contemporary circumstances. When life seems good, the majority of

citizens will infer that the leadership is good without regard to whether it actually is. This is the usual method of mass political participation, for it requires no special political skill or learning. It merely requires that each individual consult their general attitude towards life and vote for the incumbents if happy and the challengers if discontent. This has been way in democratic systems throughout history, and it will remain so until such time as the majority are political specialists. And the trend toward specialization which characterizes modernity makes it unlikely that a popular majority will ever be political specialists.

Election cycles must therefore be structured so that the people's political inferences, drawn from circumstances, reflect their leaders' true capacity. It is only when bad times actually mean bad leadership, or good times, good leadership, that mass consent based on circumstantial conjecture will yield a good choice. Social inferences will be accurate measures of leader competence only if they are correct perceptions of results traceable to the leaders' acts. A good day does not indicate good leaders. Neither does a good week or month. A good year is no clear measure of good leadership. A year is too short a period of time to see the results of a political program permeate the fabric of a nation. But a good decade is persuasive of good leadership, and a good century is quite convincing. However, the certainty of a century's hindsight is a luxury impossible to Democracy, since the life-spans of the leaders and citizens is rarely so long; and an election every hundred years would never result in any ejection of leaders at all. Every leader would die in office, never having been put twice to a vote of the people.

A decade is ample time to observe the effects of maintaining one set of leaders in office. This does not mean, however, that the optimum election cycle is a period of ten years. This is only to say that a decade is sufficient to ascertain the cause and effect relationship between leaders and national well-being. It does not say what period is minimally necessary, nor does it say what period is sufficient to effect a rapid change capable of averting an irretrievable disaster of leadership. A ten-year period of poor leadership may be so adverse to the national well-being that the nation itself collapses and further consent becomes irrelevant. For consent to retrieve a leadership failure, it must operate before the effects of bad leadership become irreversible. Consent must, therefore, operate upon the leadership often: not so often as will render it ineffectual due to ignorance, as we have noted, but often enough both to perceive and avert catastrophe. Thus, two notions regarding consent emerge, first that it must operate endlessly and periodically, and second, that the period must be as often as will permit the people both accurately to perceive bad leadership and avert it in timely fashion. This period will be one which, owing to the comprehensive nature of its contents, permits the people to accurately gauge the effectiveness of leaders.

We have noted that people measure their times by reference to their personal circumstances. These circumstances are concededly the results of their private free-choices, their self-government, but such are often compelled by factors beyond their individual control; it is these factors which the common people most readily consider to be the results of government action. If the circumstances beyond their control are disquieting, they will usually attribute this state of affairs to the actions of their government and its leaders. We must ask, therefore, which circumstances are the people likeliest to consider beyond their control; and of these, which are in fact effects of government; and finally, what period of time accrues before the people become accurately familiar with these acts and their consequences.

Of the elements of life beyond our individual control, some are not likely to be considered results of current government leadership. In the United States, one usually does not blame current government officials for one's eye color, one's county of birth, the personality of one's spouse, the frequency of snowfall, and such things, although some obtuse individuals may allege some indirect government cause for all of these. However, elements beyond the individual's control which *do* seem to the masses direct results of government action include the effects of war, the maintenance of peace, the scarcity or prevalence of crime, and the health or sickness of the economy. If war is a rarity and peace the normal condition, this will leave crime and economy as the main, presumable results of current government leadership. And, since crime is not experienced by every citizen every day in any functional nation, whereas the health of the economy is a daily factor of everyone's life, this latter consideration will usually bear the greatest weight in their opinion of government leadership. This of course reproves the old maxim that the people vote their pocket-books and wallets. We have merely established why this is usually so.

We have thus shown that mass consent is usually based on an estimation of leaders' quality, implied from personal economic circumstances. The problem with consent based on the wallet, however, is that not all economic conditions represent the quality of government. Over the long term, economic conditions point up good or ill leadership, but not in the short term. The economy moves through cycles of boom and bust, waxing and waning due to the organic functioning of markets. Since these are the natural features of a market economy, the presence of any one boom or bust is not normally attributable to any particular leader. Nevertheless, the multitude will always tend to reelect leaders when elections coincide with a boom and dump them during recessions. It is no use arguing to the jobless or their relations that they are suffering from the natural effects of the business cycle and not from the incompetence of current leaders. Nobody will be able to convince them of such theoretical truths. Those who have the talent and time will be too few to convince the disaffected and apprehensive masses. As a result, the majority will always draw this false conclusion from a general economic downturn. But, reverse the facts as you will, you will not be able to convince the majority of the opposite mistake either. The boom-times will produce apathy or appreciation. During such times, arguments condemning the current leadership fall necessarily on satiated ears, between gulps of wine, between parties, between the notes of sensual music, between lovers. Such criticisms compete for attention with the combined amusements of an entire city. They are never heard. More importantly, they never persuade a majority.

The mass of citizens in a democratic state will vote according to their bank account, and the only way to safeguard the nation from the mistaken likes or dislikes of the multitude is to arrange elections such that they fall after an entire business cycle has elapsed, after both boom and bust, such that the people accurately see both the good and bad of the state in relation to the leadership. They will in this way be able to see the leaders at their seemingly best and worst. They will thus be able to compare in a relatively objective manner the current leaders with those they knew in the past and those who promise better things for the future. This consent period will result in a reasonably informed electorate and still occur often enough to avert political tragedy. Only in this way can the democratic element skillfully play its part in counterbalancing the constitution's aristocratic and monarchic elements.

THAT THE UNCERTAINTY OF THE BUSINESS CYCLE REQUIRES A DOUBLE CONSENT SYSTEM, FEATURING A SHORT-CYCLE AND A LONG-CYCLE OPERATING SIMULTANEOUSLY

If elections should follow business cycles, we obviously must determine how long business cycles are. The answer differs in economies of various regulatory configurations and levels of complexity. However, an estimation must be made, and such estimates will either be long or short, conservative or risky. Conservative estimations will enhance public certainty at the expense of electoral accountability, while risky assessments will enhance leaders' accountability to the people at the expense of the people's informed knowledge. Either excess is undesirable. But as one or the other error is unavoidable, the only safe path is to adopt both estimations and assign one to some portion of the government, and the other to another. In this way, there will inevitably be some accurate assessments offsetting some erroneous ones. However, to preserve the moderating effects of this dual cycle, both short and long cycles must govern an equal quantum of political power. They cannot merely be applied to an equal number of offices, unless the actual power of such are comparatively equal in their aggregates.

Now, we must consider which parts of government ought to utilize the short, potentially under-informed, election cycle, and which are to enjoy a longer, better informed election cycle, keeping in mind that the former will result in safer, and the latter in more dangerous, terms of office. Some will see that as for the leader, the odds of benefiting from either system are equal to the odds of suffering under it. The short cycle might as easily allow the leader to be judged after a single boom as a single bust, and the long cycle may allow the leader to enjoy an additional single boom or bust, such that neither system is any better or worse from the politician's perspective. This is correct but irrelevant, for it is not the interests of the politician that matter, but rather society's interest in making enlightened leadership choices. This consideration turns on a different set of factors. Leaders should be subject to the short or long cycles depending on the character of their offices, for some positions admit of easy judgment after only a short tenure, while others cannot be accurately evaluated until the passage of considerable time. Additionally, some positions must be judged more often as they entail greater risks of irretrievable abuse, whereas other positions are more safely suited to a long-cycle, as they are innocuous but over long periods of time.

The risk of irretrievably bad leadership and the ease of evaluation often go hand in hand, as both share the same cause, this being the aggregate power of the office. The power of the office in this sense means the ability of the individual leader to affect the nation by imposing his own will. To the extent that he is checked and restricted by the laws and rival departments of government, he is less powerful, as he is less able to visit his will upon the nation to any great effect. With less power he is less dangerous to society, but his performance is also harder to evaluate. For this reason, the more powerful the office, the shorter must be the election cycle, and likewise the weaker, the longer. This is why it is imprudent to assign the short and long cycles to the same office serially, such that for this election the cycle will be short, but long for the next election to the same office. Such a formula violates the proposition that

the office's power itself determines whether the cycle should be naturally longer or shorter. This consideration makes it clear that if the long cycle is retroactively assigned to one branch while the short is given to another, the strength of each branch will change. The adoption of such consent cycles must therefore be done with care, lest the checks and balances of the constitution become skewed. Where offices differ, even within one branch, diverse cycles may be necessary. For example, the chairman or speaker of the legislature wields more power than the other legislators and thus ought to endure a shorter election cycle. In summary, to optimize the constitutional element of consent, election cycles must conform to the rule that the more powerful the office, the shorter the election cycle, and the weaker the office, the longer the cycle.

Electoral cycle-length can thus be employed to balance constitutional forces. There are some important limitations to this utility, however, which proceed from the nature of the functional separation of powers, and these limitations ultimately dictate how the cycles must be adopted. The first limitation derives from the judiciary's weakness. As we will explore later, this branch is so weak that to function properly, it must be immune from election altogether. Judicial impartiality requires that the judiciary be immune to the majoritarian pressures inherent in elections. Thus, the question as to whether long or short election cycles suit the judiciary is moot. The second limitation derives from the executive branch's optimal composition as a single elective position. This composition is required if one rejects, as we do, the propriety of a compound executive. If a compound executive were adopted, which is itself a mistake, it would be possible to assign a short cycle to one part of it and a long cycle to another, thus maintaining the net power of the branch vis-à-vis the other two branches. However, since the executive power is, as we shall see, best organized under a single person's authority, there will be but one executive branch election. This limits the election cycle choice. It must be either long or short. It cannot be both, that is, unless it is an average of the two. But, an average of what two? The two used in the only other branch left, namely the legislative.

By process of elimination, it becomes clear that the simultaneous adoption of two cycles can only be applied to the legislative branch. This is convenient since legislative power is naturally so strong that bifurcating it into competing parts helps balance it against the weaker executive and judiciary powers, as we shall also see. This bicameral approach to limiting legislative power provides the bodies upon which a short and long election cycle can be brought to bear. The two legislative chambers can be arranged such that one contains slightly more power, offset by a shorter election cycle, and the other, less power but a longer cycle. Such a scheme greatly improves the consent power of the constitution's democratic element, as every under-informed election can be offset by an enlightened one.

Referring back to the executive branch, unless the executive election cycle is an average of the two cycles used in the legislative branch, it will automatically become unbalanced with respect to the legislature as the consent of the people operate on it with greater or less prescience than they exercised in the legislative elections. Therefore, if the executive election cycle is not the mean of the legislative cycles, the balance of powers will be overset, which is disastrous to justice. The unstated premise of this is that otherwise balanced branches can be overset if only one is filled with incompetents.

In this regard, we note with approval that the Respondent's legislature indeed has two cycles, of six years in the Senate and two years in the House of Representatives,

and that its Executive cycle is a perfect average of the two, being four years. We note parenthetically that there is no reason why the legislative branch might not use more than two differing electoral cycles. However, it remains the case that the executive cycle must equal the mean of the legislative cycles, however numerous.

This is a principle reason why parliamentary systems are less suited to optimum justice than those with a single executive elected at fixed intervals as described above. When the government can, at its own whim, call an election, the operation of consent cannot optimally function. The government and its adversaries will time such elections so as to coincide with booms and busts, great victories or great disappointments, and these are the very coincidences which tend to ruin the correct operation of consent.

Thus, we can conclude our introductory analysis of consent by restating that consent forms the democratic element of the constitution; that it operates mainly through elections; that the masses usually vote according to their economic satisfaction; that consent operates best when the people accurately trace social effects to their human political causes; that this cannot be reliably done within the confines of a single business cycle; that it requires a period of time longer than one business cycle yet short enough to avert irreparable damage; and that twin consent periods are thus called for, one slightly longer and one shorter than an average business cycle. An optimum consent period will result in a reasonably informed electorate and yet recur often enough for consent to avert political tragedy and inject a degree of merit into government. In this manner, the democratic element can counterbalance the power of the aristocratic and monarchic elements of the constitution.

THAT BEYOND A POINT, INCREASING THE SIZE OF ELECTORAL DISTRICTS AND THE NUMBER OF REPRESENTATIVES ELECTED FROM EACH DEEPLY IMPAIRS THE DEMOCRATIC ELEMENT

Elections require geographic zones within which the people select officers from among candidates. These election districts can be small or large. The smallest district might be a single house, and the largest might encompass the whole nation. Assuming each district elects one representative, the smaller the district, the more perfectly the constitution resolves into a pure democracy, as the number of districts, and hence representatives, approaches the number of citizens. At the other extreme is one district which encompasses the entire state. This is only as democratic as the number of officers elected from the district, for if it elects one representative, he will compose the entire government, creating nearly a pure monarchy. Thus, as districts shrink, the constitution becomes more democratic; as they grow, it becomes more aristocratic, unless the number of representatives per district grows proportionately.

Increasing the number of representatives per district creates a question as to how many votes a citizen may cast. If only one, various consequences arise which differ markedly from systems in which voters cast as many or more votes as offices to be filled.

THAT DEMOCRATIC ELEMENT'S CONSENT POWER MUST NOT BE EXERCISED THROUGH THE DEVICES OF PLEBESCITES, REFERENDA, AND PROPOSITIONS.

The vote of the citizens on policies and programs, as opposed to the mere choosing of candidates for office, is fraught with most of the very same dangers which doom pure democracy. It therefore seems odd that these techniques should be objects of enduring esteem. But since such devices, like Plebescites, referenda, and propositions, which put policy and programs to a vote of the people are quite popular, we must describe in more detail the particular evils which they unavoidably introduce.

Political issues are extraordinarily complex and require meticulous analysis. The task of legislation therefore requires specialists, persons who know the law, understand politics and society, and can perceive how changes in the one will affect the others. The layperson, the average citizen, is rarely so trained or gifted. A layperson is not qualified to legislate. Even less qualified is the layperson in groups. These are typically referred to as mobs and are even less able to legislate effectively than the single layperson. Their incompetence stems from two sources, first, their predisposition to emotional decision-making, and second, their inability to acquaint themselves with the relevant details of the issues at stake. Let us look at each of these handicaps.

Mobs are quintessentially emotional. They usually pressure individuals physically or verbally to adopt majority decisions without allowing time for logic and reason to play a sufficient role. It is for this reason that mobs often vote unanimously in one direction or another, particularly within factions. Mobs are also impulsive, for they are impatient. The effects of passion or fatigue often produce hasty decision-making devoid of study or reflection.

Additionally, mobs are inadequately informed and hence rely on simplistic conceptions. They cannot acquaint themselves with the intricacies of issues. This is a function of their size, the degree of leisure they possess, and their interest in political questions. It must be emphasized that the latter two factors are axiomatically reduced by the increase in the size of the mob. As mobs increase, the most populous, and usually the less wealthy, classes, begin to predominate, and these are not only those who are less familiar with and interested in political matters, but due to economic circumstances, possess the least amount of time for considering political matters. In order to persuade a mob, issues must be oversimplified. Only the simplest and most obvious positions on issues will be able to reach the minds of the mob, not simply because of their lack of political specialization, but also because time is scarce and communicating with them is difficult. A street corner mob learns by word-of-mouth. A national mob learns through the mass media. In either case, the amount of time available to communicate the details of issues is scarce. Time is scarce on the street corner because of the fatigue and restlessness of the citizens. Media time is scarce because it is costly.

Moreover, word-of-mouth is a notoriously bad method of communication. All who have whispered a sentence from person to person around a circle know that the end result often bears little resemblance to the original utterance. Thus, word-of-mouth requires even greater oversimplification than other forms of communication.

It is this reason that mobs rely on slogans and ideologies. More complex concepts cannot swim through the raging currents of the multitude. As for the mass media, it has defects as well, and its potential bias, whether due to free market capitalism or state interference, renders it incapable of truly informing the people about complex political questions.

Thus, having the people vote on policies, laws, and programs is a dangerous and faulty method of legislation. It makes the mob into a legislature. Now, some may suggest that at least the most important issues should indeed be put to the people, for example, constitutional amendments. Yet, as the importance of the issue increases, so invariably does the complexity and delicacy. Nowhere is this more the case than in constitutional questions, and these should therefore be put to the people least of all. Thus, although the democratic sheen makes plebiscites, propositions, and referenda seem salutary, they are in fact a source of imprecision and impulsiveness which must be avoided if government is to be successful.

THAT THE DEMOCRATIC ELEMENT'S CONSENT POWER IS EASILY DEFEATED BY DESTROYING FREE THOUGHT AND FREE SPEECH

Even if the public enjoys political participation, and even if elections perfectly gauge the public will, the consent power of the people can still be utterly defeated if their will itself can be manipulated by the aristocratic or monarchic elements. This is why the power of the democratic element, as exercised through consent, is inextricably tied to the freedoms of speech and opinion. By controlling the thoughts of the people, their consent power can be neutralized and their constitutional influence destroyed.

The most effective way to neutralize the people's consent power is to render them incapable of free thinking. Japan is the greatest practitioner of this anti-democratic stratagem. Japanese schools, government, social institutions, religion, language, and customs all conspire to render the multitude in that country unsuited to free thought and therefore astonishingly complacent and obedient. Confucianism forms the ideal cradle for raising such devoted children, as it envelops them with an extreme respect for authority. It was to amplify this social conformity that the Japanese leaders imported Buddhism in the sixth century A.D.²¹⁴ Zen Buddhism acted to channel any free thought not stamped out by Confucian culture and political oppression into the harmless infinity of religious paradox. Century after century, the Japanese people were taught that social and political obedience was the paramount virtue, and before long, the state found that it could literally manufacture 'truth' for a people unable to think their way beyond it.²¹⁵

This method of destroying democratic power is so thorough that we must consider it in detail. A people systematically rendered unable to develop political opinions of their own cannot exercise any meaningful power, whatever formal procedures they enjoy. They may indeed exercise consent, but their consent is predetermined by those that make and control their ideas. In Japan, this was accomplished by eliminating the idea that any truth might exist beyond that espoused by the

²¹⁴ Van Wolferen, *The Enigma of Japanese Power*, Chapter I, Section 2.

²¹⁵ Van Wolferen, *The Enigma of Japanese Power*, Chapter I, Section 2.

government. The opinion of the government was the very definition of truth and therefore became incontrovertible. Van Wolferen stated the phenomenon succinctly:

In the West, reality is not often thought of as something that can be managed, molded, or negotiated...[The] most crucial factor determining Japan's socio-political reality, a factor bred into Japanese intellectual life over centuries of political oppression, is the near absence of any idea that there can be truths, rules, principles or morals that always apply, no matter what the circumstances...The tolerance of contradiction is closely connected with [this mindset]...Concepts of independent, universal truths or immutable religious beliefs, transcending the worldly reality of social dictates and the decrees of power holders...have never taken root [in Japan] in any surviving world view...[The Japanese people] are less free than they should be. Japanese are treated by their school system and their superiors the way a landscape gardener treats a hedge; protruding bits of the personality are regularly snipped off. It is simply not possible for a political system to be unkind to the individual without this having grave consequences...for the citizenry.²¹⁶

The aims of Japanese schools could hardly be further removed from the original sense of the English word 'education': to bring forth and develop the powers of the mind, rather than merely imparting factual information. Far from sharpening the reasoning ability of its charges, the Japanese education system, on the whole, is hostile to such a purpose. Spontaneous reasoning, along with spontaneous behavior, is systematically suppressed...there is no patience with originality. Pupils are not taught to think logically, or to ask the right questions—indeed to ask any questions at all.²¹⁷

In this manner, the Japanese elite purged the democratic element from their constitution. Although MacArthur enacted a mixed constitution for Japan during the American occupation after the Second World War, the Japanese people had already been rendered mentally incapable of exercising any kind of meaningful consent, and their constitution remains mixed only on paper. We have already seen that relativism is an intellectual absurdity. Now, however, we are able to see its political effects, which are essentially tyrannical. This is because the elimination of logical reasoning is the ultimate weapon for destroying political freedom. It is the want of mental faculties that places the rest of the Earth's creatures under the nearly unlimited tyranny of mankind.

The downside of so neutralizing the people's power is that it renders them relatively less imaginative, less innovative, and therefore, less productive. Consequently, most who seek to destroy popular power do not adopt Japan's method, but rather cultivate the reasoning power of the people to its utmost and then limit and edit the information available to them. In this way, people will remain tolerably intelligent

²¹⁶ Van Wolferen, *The Enigma of Japanese Power*, Chapter I, Section 2.

²¹⁷ Van Wolferen, *The Enigma of Japanese Power*, Chapter I, Section 2, also Chapter IV, Section 1.

and productive, but their consent will invariably conform to the will of the aristocratic or monarchic elements. Indoctrination and censorship are the age-old methods of accomplishing this. The young are turned by the former, the old by the latter.

It is to guard against this method of destroying the democratic element that the principles of religious toleration and freedom of thought have come to play such a prominent role in political theory. Their greatest political utility is safeguarding the mixed constitution's democratic element. The salutary effect of free thought on mankind's intellectual and technological development also redounds to the strength of the state, certainly. However, these benefits are secondary compared to the incalculable benefits of political liberty and justice which flow from a mixed constitution with a democratic element, for technological acumen is worse than useless in a Tyranny or Oligarchy, where it simply augments and enforces the collective misery of mankind.

Freedom of thought is crucial to the people's consent power. Other names for freedom of thought are toleration and freedom of opinion. For such freedom to exist, however, more specific freedoms must flourish, namely the freedoms of religion and speech, without which free thought is impossible. These make possible in practice what freedom of thought represents in the abstract.

Popular consent is most easily coerced by aristocratic or monarchic elements when they can dictate how the people think. Since religious thinking is a particularly powerful cognitive structure and motivational instrument, it becomes all the more clear that the independent thought of the people in religious matters is essential. Without this, their political exercise of consent is of no constitutional consequence. When the state gains control over religious beliefs, it obtains a nearly absolute ability to manipulate the people's political opinions.

State-sponsored religion, however pure its intentions, impairs the freedom of thought upon which the Democratic element of the constitution rests. It was with this in mind that Gibbon remarked, "The various modes of worship which prevailed in the Roman world were all considered by the people as equally true; by the philosopher as equally false, *and by the magistrate, as equally useful.*"²¹⁸ Machiavelli also noted the vast political leverage which derived from state religion. He did not address the moral impropriety of dictating to the people the terms of their faith. Rather, he outlined the political ramifications of state religion.

[E]cclesiastical principalities...are sustained by ancient religious customs which are so powerful and of such quality, that they keep their princes in power in whatever manner they proceed to live. *These princes alone...have subjects without governing them,...their subjects not being governed...neither think nor are capable of alienating themselves from them.*²¹⁹...[W]here religion exists it is easy to introduce armies and discipline, but where there are armies and no religion, discipline is difficult to cultivate²²⁰... In truth, there never was any remarkable lawgiver...who did not resort to divine authority, as otherwise his laws would not have been accepted by the people.²²¹

²¹⁸ Gibbon, *The Decline and Fall of the Roman Empire*, Vol. I, Chapter II. (Italics Supplied)

²¹⁹ Machiavelli, *The Prince*, Chapter XI.

²²⁰ Machiavelli, *The Discourses*, Book I, Chapter XI.

²²¹ Machiavelli, *The Discourses*, Book I, Chapter XI.

Despite Machiavelli's warnings regarding the power of religion, countless peoples have submitted to state religions in the belief that these constituted the genuine will of God. This phenomenon began to decline when Locke exposed the self-contradiction and impossibility of a faith dictated by political establishment, proving such from the principles of religion itself. In his *Letter Concerning Toleration*, Locke stated:

...The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of understanding, that it cannot be compelled to the belief of anything by outward force...And upon this ground I affirm, that the magistrate's power extends not to the establishment of any articles of faith or forms of worship by the force of his laws. For laws are of no force at all without penalties, and penalties in this case are absolutely impertinent; because they are not proper to convince the mind...Everyone is orthodox unto himself...It is only light and evidence that can work a change in Men's opinions...²²²

Locke showed that true religious faith can only exist upon the free intellectual acceptance by the faithful, and that state coercion could not possibly produce a faith acceptable to God, who would be offended by a faith of political convenience. This idea freed the masses of faithful from the enslaving perception that their religious salvation required political obedience: salvation through political obedience was impossible. With Locke's theory of faith based on inward persuasion, church and state began to separate and the masses could be spared the intellectually and politically stultifying effects of state religion. Consequently, their ability to exercise real consent was dramatically improved.

Freedom of religion is only part of the road to free thought. A strong regulation of the press can still hold a populace in ignorance or channel them into prefabricated ideologies, friendly to the ruling aristocratic or monarchic elements. Censorship and a state-controlled media provide the aristocratic and monarchic elements with a powerful method of eliminating the people's ability to exercise political power by preventing both the emergence and the spread of critical or threatening opinions.

During the enlightenment, political philosophers showed that censorship, like religion, was a self-contradictory policy. Its disutility was proved from the very justifications offered by the state. Governments typically justify censorship on moral or self-defense grounds, that it prevents intellectual and moral injury and thereby improves the people and state. The only way to dispute this is to prove that the free circulation of ideas, even of the most false and diseased sort, cannot possibly result in intellectual or moral injury, and that censorship *itself* works the moral and intellectual injury. This argument was made most poignantly by Milton, who wrote that censorship of publications:

...will be primarily to the discouragement of all learning, and the stop of Truth, not only by disexercising and blunting our abilities in what

²²² Locke, *A Letter Concerning Toleration*. This was a widely published epistle to Philip von Limborch, written in 1685.

we know already, but by hindering and cropping the discovery that might be yet further made both in religious and civil wisdom...[W]hat wisdom can there be to choose, what continence to forbear without the knowledge of evil...[T]he knowledge and survey of vice is in this world so necessary to the constituting of human virtue and the scanning of error to the confirmation of truth, how can we more safely and with less danger scout into the regions of sin and falsity than by reading all manner of tractates and by hearing all manner of reason? And this is the benefit which may be had of books promiscuously read. Let [falsity] and truth grapple; who ever knew truth put to the worse, in a free and open encounter?...Ye cannot make us now less capable, less knowing, less eagerly pursuing of the truth, unless ye first make yourselves...less the lovers, less the founders of our true liberty. We can grow ignorant again, brutish, formal and slavish, as ye found us; but you then must first become...oppressive, arbitrary and tyrannous...²²³

The point was furthered by Mill, who stated that political liberty utterly depended on intellectual freedom:

...[T]he liberty of the press [is] one of the securities against corrupt or tyrannical government²²⁴...Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. Until then, there is nothing for them but implicit obedience...The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice. He who does anything because it is the custom makes no choice. He gains no practice either in discerning or in desiring what is best...He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation.²²⁵

Mill's insight is critical to understanding the democratic element's health. Freedom of thought gives rise to creative individuals, and only these can be effective participants in a democratic system. Einstein makes a similar point regarding the utility of free thought, but applies it even more widely, for not only does he state that individuality and political cohesion exist in reciprocal symbiosis, a phenomenon we explain by describing its effects on the democratic element, but he makes the further claim that it enhances all social goods and is ultimately responsible for all things of social value:

It is clear that all the valuable things, material, spiritual, and moral, which we receive from society can be traced back through countless generations to certain creative individuals. The use of fire, the cultivation of

²²³ Milton, *Areopagitica*, *A Speech For The Liberty Of Unlicensed Printing, To The Parliament Of England*, 1644.

²²⁴ Mill, J.S. *On Liberty*, Chapter II, 'Of Thought and Discussion'.

²²⁵ Mill, J.S. *On Liberty*, Chapter III, 'Of Individuality'.

edible plants, the steam engine—each was discovered by one person. Only the individual can think, and thereby create new values for society—nay, even set up new moral standards to which the life of the community conforms. Without creative independently thinking and judging personalities the upward development of society is as unthinkable as the development of the individual personality without the nourishing soul of the community. The health of society thus depends quite as much on the independence of the individuals composing it as on their close political cohesion.²²⁶

Justice absolutely *requires* intellectual freedom. Without it, no person will become a creative individual, and hence none will have the capacity for self government. And without self-government to some extent, there can be neither a democratic nor a ‘harmonic’ constitution, a type we will discuss later, and hence no justice. There will only be the power of the aristocratic and monarchic elements, who will be able to ride booted and spurred upon the backs of the people indefinitely. For these reasons, it is clear that obtaining and preserving justice requires freedom of thought.

THAT THE FREEDOMS OF SPEECH, THOUGHT AND RELIGION ARE ALL FACETS OF INSURING THE PEOPLE’S ENLIGHTENMENT AND EDUCATION, WITHOUT WHICH THEY CANNOT EXERCISE CONSENT POWER IN A MIXED CONSTITUTION

Only an educated people can effectively participate in a mixed constitution. Without education, their consent and participation are simply coopted and rendered meaningless by the aristocrats. Consent requires enlightenment if it is to check power of the aristocratic and monarchic elements, and enlightenment requires the mind to explore the mysteries of the cosmos freely. Therefore, the highest necessity to democratic government is unbiased and deep education.

Ignorance creates political slavery and destroys democratic power. Only the uneducated or intentionally mis-educated can be enslaved with certainty. This is why educating slaves in America’s antebellum South was illegal. They could thereby be deprived of the intellectual ability to conceptualize their own freedom and organize to obtain it. For example, the Georgia state penal code criminalized the teaching ‘of any slave, negro, or free person of color, to read or write.’ South Carolina outlawed ‘any number of slaves, mulattos, or mestizoes, even in company of white persons, to meet together for the purpose of mental instruction or religious worship, either before the rising of the sun or after the setting of the sun’.²²⁷ Of course, during daylight hours, the toil of the slaves prevented educational activities without the need of statutory prohibitions. State law kept blacks ignorant so that they could be reliably enslaved.

This connection between education and freedom was underscored by Bryan, who criticized America’s brief desire to colonize the Philippine Islands:

²²⁶ Einstein, *The World As I See It*, Chapter VI, Society and Personality.

²²⁷ Friedman, *A History of American Law*, Part II, Chapter IV.

If...the Untied States...[decides to] hold the Philippine Islands permanently...[as] colonies,...it must expect the subject races to protest against such a policy and to resist to the extent of their ability. The Filipinos do not need any encouragement from Americans now living. Our whole history has been and encouragement...Some argue that American rule in the Philippine Islands will result in the *better education* of the Filipinos. Be not deceived. If we expect to maintain a colonial policy, we shall not find it to our advantage to educate the people. The educated Filipinos are now in revolt against us, and the most ignorant ones have made the least resistance to our domination. If we are to govern them without their consent and give them no voice in determining the taxes which they pay, *we dare not educate them lest they learn to read the Declaration of Independence and the Constitution of the United States...*²²⁸

For any people to exercise democratic power, for any nation to enjoy democratic hues of government, the people's ability to consent knowingly and freely must be assiduously protected and cultivated. Without this, there is no Democracy, no democratic influence and no democratic constitutional element, no matter what the constitution describes on paper. All the votes in the world are meaningless without free-thinking voters. This enlightenment requires freedom of religion, freedom of thought, freedom of speech, and unbiased education, the kind which not only imparts facts, but primarily cultivates the reasoning powers of the mind. Such are mandatory if a triple-mixed constitution is to operate, and we have seen that this is the only manner of structuring a just and stable political system. Insuring these freedoms safeguards the people's enlightenment, and without this they cannot meaningfully participate in a mixed constitution.

THAT GOVERNMENTS MUST NEVER PROMOTE, IMPAIR, OR SUGGEST RELIGIOSITY IN ANY WAY

The Democratic element cannot effectively operate under the religious influence of a state. Its power will dissipate as its religious opinions and ideals are shaped and controlled by the aristocratic and monarchic elements operating through the executive, legislative, and judicial branches. The democratic element's demise will result in an unstable constitution and correspondingly weaken the entire nation. For this reason, governments must never promote, impair, or suggest religiosity in any way.

It is not enough to say that governments should not establish any official religion; they will try to establish unofficial ones. Nor is it sufficient merely to forbid impairing religious freedom; they will construct vast religions and claim no impairment to others. They must be forbidden to suggest religiosity in any way. This will prevent not only state interference with any individual's beliefs, but will stop the establishment of state religions and even state use of religious utterances. It will stop the conveyance of any impression of religiosity by any part of the government. Only in this way can the democratic element play an equal roll in the constitution. Otherwise its influence will be diminished and the nation destabilized.

²²⁸ Bryan, *Speech of Acceptance at Military Park, Indianapolis, August 8, 1900*, from Adler's *The Annals of America*, Volume XII, Article VXXIII. (Italics supplied.)

THAT A THEOCRATIC ELEMENT IS DISASTROUS TO ANY STABLE CONSTITUTION

Religious rule is called Theocracy, and theocratic elements are disastrous to a stable constitution. Specifically, theocracy is rule by a religious one or few and therefore a type of either monarchy or aristocracy. But Theocracy is special because it is based on faith, a system inherently opposed to logic and free-thinking. We say this not because divinity is in any way illogical, but because no major religion has advanced a purely logical theory of god; all rely principally on faith.

Faith is belief without proof. When proof is dispensed with, the skills it requires either wither of their own disuse or become discouraged as sacrilege. Since the ability to rule requires wisdom, which is never innate but requires reasoning and logic, faith-based systems destroy the governmental capacity of whatever element they dominate. They destroy democratic elements by dictating their opinions and eventually eliminating their reasoning powers. This poison likewise destroys the executive, legislative, and judicial branches, although here the poison works from within the branch on the branch itself. It renders them ignorant and therefore incompetent.

Theocratic forces can also destroy the harmonic constitution by damaging the competitive essence of human association. The ultimate fact of human nature, and all life, is its competitive urge. This omnipresent impulse is the basis upon which all human associations thrive. It is present in capitalism, in the adversarial legal system, and in the idea of governmental checks and balances. It also governs the international balance of powers. It extends upwards through all levels of human organization and downwards into the very cellular and genetic functioning of mankind. In the words of science, it is a fractal. All is competition, and all is best when competition is introduced and maximized. On the cellular level this is called health, on the financial, wealth. On the political level, this is called justice. Religions can injure states if they diminish this competitive force.

If a religion discourages competition, it will impair the forces which both hold the state together and prevent one part from dominating another. If one element, under the influence of religion, refused to compete with the others, the constitution would destabilize and revolution would ensue. If federal member states or their central government, under religious influence, abandoned competitiveness, the federation would disintegrate. A religion that discourages material gain impairs competitive capitalism, which weakens the democratic and aristocratic elements in their political capacity. Thus, a theocratic element is dangerous to justice by both its anti-competitive potential and its basis in faith.

Theocracy, like any aristocracy or monarchy, will fall into corruption and tyranny. Now, it will disguise this by defining it as the will of god. But it will still be tyrannical because it will still be an unchecked political system comprised of human beings, whose power will corrupt them by nature—god's nature if you like. It will generate revolution eventually, as do all unjust systems. In a theocratic environment, these revolutions are usually religious. They are called schisms or sacrileges by the prior theocracy, and reformations by the upstarts. They are still violent, still bloody, and still revolutions. Theocracy thus cannot be a just system, unless recurrent revolution, violence and one's own death are offered as justice.

Religions thus often depend on the idea of justice by death. This is the principle

of justice in the afterlife. Theocracies need this in order to support the injustice of their own systems and destroy rival theocratic or secular political threats. This court rejects the idea of justice by death. As far as this court is concerned, no theory of afterlife justice will be tolerated, as the problems that confront the living either confront the dead as well, requiring a posthumous harmonic federation equally devoid of theocratic elements, or death is insufficiently knowable to posit the conditions of its justness. The court notes, in passing, that the divine compositions of most religions reek of tyranny or putrid oligarchy. The addition thereto of infinity makes this miserable stench hopeless, even when called by the name 'heaven'.

For this reason, a healthy constitution must insure that theological matters are strictly subject to democratic principles, that is the perfect self-rule of each person. Religious freedom gives to each individual the government of all theological matters affecting themselves. There can be no room for even a faint hue of aristocratic force in this government.

THAT RELIGION IS A SOCIAL FACTION WHICH MUST BE SUBJECTED TO THE SEPARATION OF POWERS AND THE PRINCIPLE OF THE HARMONIC CONSTITUTION

It is not good for a nation to attempt an enforced atheism. It is not human and also not efficient. Sentient beings, however intelligent, will always have unanswered questions, curiosity about death and a desire to transcend personal conditions. And so religion will always be in the hearts of mankind. Preventing it would be to the extinguishment of all mortal curiosity, hope, and desire. And since it cannot be eliminated, regardless of its illogic and emotionalism, it must therefore be rendered compatible with just political systems.

To render religion compatible with justice, it must not become tyrannical, which is to say, it must be subject to competition. But competition from secular ideology is insufficient, as religion deals with issues which evade secular thought and defy reason. The only credible competition is therefore a host of alternative religions. This is religious pluralism, and it deters the advent of religious tyranny.

Now, this religious pluralism can be termed freedom of religion if need be, but it is actually more than that. It can be achieved in three ways. First, multiple religions can be tolerated or protected. Second, a single religion can abandon monotheism in favor of a competitive framework of multiple gods. Third, a single religion can subdivide its one deity into multiple facets or incarnations. The first is, or can be, true freedom of religion. The second is the system adopted by the Greeks. The third is the manner of modern Christianity. In each of these three cases, there is a degree of religious competition, highest in the first example, lowest in the last.

This is not simply a theological topography, however. The same arrangement and same dichotomy of choices is found in the laws which govern political parties in parliamentary and two-party systems. A monotheistic system presents a single god which handles all matters and issues, so to speak, as does a catch-all party in a one or two party system. On the other hand, in multi-party environments, each party represents a narrow range of issues. This is akin to the Greek theological system featuring myriad gods of varying specialties, i.e. a god of war, another of wisdom, etc.

It is critical for a nation to use mankind's religious tendencies to best advantage. This requires, as we have said, that religions not become tyrannical political factions or elements of government. There must be no *theocratic* element. It also requires that religion not be to the stop of all learning and thought. Thus, religion must not be dominant educationally. To prevent these dominances, religions must compete not only with the rational or logical systems of thought, but with other deistic notions. There must be a separation of religions. Each society must have a balance of divine power. And to prevent religious war from arising, no religion may be permitted political power in any respect. In fact, the entire edifice of governmental power must be arrayed against the influence of religion per se, and in particular, any dominating religion.

THAT EXCESSIVE RELIGIOUS FREEDOM ONLY MAKES CHURCHES INTO GOVERNMENTS, DESTROYING FREE RELIGION

Some claim that all religious practices should be above the law, immune from legislative interference. Others, going less far, claim that religious freedom authorizes the violation of contradictory general laws and statutes unless the government can adduce a compelling state interest in regulating the area. The flaw in both of these arguments is easy to see: When religious freedom is so extensive that ecclesiastical laws trump those made by the legislature or by common law, churches become legislatures. And since their composition is usually oligarchic and tyrannical, their laws are unjust. They proceed to take on executive and judicial functions of necessity, as per the principle of dialectical constitutionalism, and the climate of religious freedom evaporates in a sea of competing ecclesiastical governments. The laws made by these church governments need not respect the religious differences of their parishioners or the rest of the people. Hence, when churches become governments, religious freedom is lost, because the churches themselves destroy it. Therefore, religious freedom which is so extensive that churches become supreme lawmakers destroys freedom of religion. This is the limit which all societies interested in free religion must observe in order to safeguard religious freedom. In other words, freedom of religion requires that religions not be entirely free, lest in the exercise of that freedom they become oppressive governments.

THAT THE EXTRAVAGANT USE OF THE JUDICIARY BY THE WEALTHY ALSO IMPAIRS THE PEOPLE'S CONSENT POWER

We must also note that the people's consent power can be coerced and ultimately subverted by privileged access to the judiciary by the wealthy. The wealthy can afford private civil litigation, both defensive and offensive, and criminal defense litigation, on a scale far greater than can any common citizen. The same is true for large corporations with respect to small ones. Large firms and wealthy individuals can 'buy' more justice than can the masses. They can perfect their rights through use of the courts to an extent impossible to others. This renders them relatively more powerful than their smaller competitors or the public at large.

This is an unfortunate consequence of market-based legal representation. It allows the wealthy greater access to the judiciary. Still, it does not necessarily deprive the poorer or weaker elements of society from exercising their political rights with respect to the other two branches. In some cases, however, the wealthy can indeed use the courts to stifle such political activities. The wealthy can use lawsuits to intimidate or coerce the people into political abstinence and thereby destroy their consent power. As we will investigate later, Pring described this danger and labeled such lawsuits 'SLAPPs,' or Strategic Lawsuits Against Public Participation. These suits debauch the 1st Amendment's freedoms of petition and association, which accord all citizens the right to peaceably assemble and petition government for the redress of grievances. In this respect, SLAPPs retard the healthy operation of the democratic element of society. In order to protect the correct functioning of this element, a state must not permit its private citizens to interfere with consent related activities by means of lawsuits. If the wealth of some private citizens or corporations vastly overbalances that of the masses, the danger arises that their extravagant use of the legal system and recourse to SLAPPs will eventually negate the democratic element.

Certainly, when private actors are wealthy enough to destroy the consent of the people by strategic use of lawsuits, antitrust law will be able to reduce such abuse, to the extent of its application in the field of commerce. In this respect, antitrust policy promotes the health of the people's power to consent. This will be investigated in later, as will the similar effects of progressive taxation. Here, it is our objective merely to recognize that extravagant judicial use can impair the people's consent power.

THAT THE DOCTRINE PREVENTING ONE LEGISLATURE FROM BINDING A SUBSEQUENT ONE IS REALLY A GUARANTEE OF THE PEOPLE'S POWER TO CONSENT

The doctrine preventing one legislature from binding a subsequent one is really a guarantee of the people's power to consent afresh, which is the mechanism whereby the democratic element operates and government action is legitimated and supervised. Therefore, legislatures which attempt to bind future legislatures are acting illegitimately, anti-democratically, in violation the optimum consent required for legitimate and practical government. That such consent not become merely an ancestral artifact, current legislatures are forbidden to bind future legislatures. This doctrine also tends to widen the aristocratic element and make it more dynamic, as some future legislative positions will be won by members of the democratic element, who thereby must be considered rather part of the aristocratic.

THAT THE PEOPLE AND OFFICEHOLDERS FORM POLITICAL PARTIES AND INTEREST GROUPS TO INCREASE THEIR STRENGTH.

Every society has contentious issues, and for each issue there arise groups interested in alternative resolutions. This phenomenon is the natural cause of political

parties and interest groups. In order to attain their political goals, individuals form groups. When they do so, they introduce hues of Aristocracy into the democratic element. But the democratic is not the only element which coalesces into groups to pursue various agendas. The monarchic and aristocratic elements form such groups as well. Because of this tendency, each element of the constitution always becomes progressively aristocratic; Aristocracy is the natural centripetal force of political competition. But even if there were no contentious social issues in a society, the people would still form political parties, since their natural tendency towards efficient behavior would impel them to do so. Consequently, laws must be adopted to govern these groups lest all of the constitutional elements collapse into pure Aristocracy and the constitutional cascade recommence.

The number and shape of political parties or groups is a natural product social divisions and their corresponding issues. But this composition is then manipulated and refined by the formal rules governing the political process, such as election and candidacy laws. Therefore, let us look briefly at the nature of social divisions and issues, the resulting groups, and the rules which must, in hindsight, govern these groups, if the role of political parties and interest groups is to be reconciled with a healthy democratic element and a mixed constitution.

First, let us look at the formation of groups among the popular element. Some issues are not for the people. Legislators may form parties over issues about which the people care little, such as retention of legislative staff assignments or other internal matters. The people's issues, on the other hand, spring from the fabric of society as a whole and correspond to the differences in the warp and weave of that fabric. Popular political issues come from social divisions, which arise in all societies along the lines of race, sex, religion, economic class, geography, language, and employment, to name just a few sources. From these divisions, whether real or perceived, groups coalesce and compete for favorable political results. These are the political parties and interest groups which inherently populate the political landscape of the popular element. However, the structure of the political system itself then refines and manipulates these naturally forming groups such that many merge into formal political parties seeking to elect their partisans to office, while many more become small special interest groups focused on influencing incumbents within the government. For our purposes, we call political parties those that *want to become* the government, whereas special interest groups seek to *petition* the government. The final number of each and the ratio between the two is a natural result of the constitution's electoral rules and legislative format. As we shall see, some constitutions naturally foster many political parties but stifle interest groups, while others do just the opposite, they constrain all the parties to merge into two or three giants but spawn great numbers of interest groups.

But as we have said, even if there were no contentious social issues, the people would still form political parties since it is efficient to do so. Now, in a very small Republic, the exercise of consent through elections is relatively easy for any individual, however lowly. The issues and candidates are few. Everyone understands the questions and usually knows the candidates personally. With complexity, however, this simple exercise of consent becomes impossible. Issues become esoteric, candidates are unfamiliar, and gaining an understanding requires more time and effort than the average citizen in a large Republic can afford. This frustrates the constitution's democratic element; it forms an impedance which increases in proportion to the size and complexity of the state. To exercise their consent more effectively and efficiently, the people, therefore, invariably form organized bodies. These, by concentrating the

group's resources and efforts, develop the specialization needed to exercise effective consent in a complex state. The group appoints persons to represent it in various political undertakings. One of these is to gather and analyze political information, another is to form opinions about the information based on the needs and interests of the group. A third is to locate and groom candidates who themselves may stand for election and further advance the interests of the group. A fourth is to identify and court incumbent officials who are appropriate targets for attention and persuasion. In this way, the citizens regain an effective voice in the complex state and increase not only their ability to make their voice heard by the government, but also their chances to become a part of the government itself. It is to protect this process of political party-making that the all-important 'freedom of association' is protected by constitutional amendment in the United States. Without such protection, the aristocratic and monarchic elements could manipulate and subvert the democratic element's ability to make itself felt and heard in the complex state.

This is the genesis of the popular political party, however broad or limited its objectives. But it is not the only instance of the political party. After such popular factions originally coalesce and some species of government emerges, the elements of that government, being collections of individuals themselves, will likewise associate into groups in order to further amplify their power. This is a derivative and often reciprocal party-making. It is their object to increase their power over other colleagues within their office of government, over other branches and parts of government, and over the people themselves. Thus, the aristocratic and monarchic elements of the constitution will form parties in the same way and for the same reason as the popular element. All parties from all segments of society then bear upon each other, merging, morphing, splitting or disappearing.

The aggregate power of the popular political parties will, however, usually overpower that of the aristocratic and monarchic elements so long as the constitution features a mixed government, for the separation of powers itself will structurally prevent the monarchic and aristocratic elements from making permanent common cause, whereas no such division naturally exists among the people. And yet, the government can legislate such divisions artificially and force them on the people in the form of election and ballot access laws. In such a case, the people may not be able to organize into a single party, for example, or into a very large variety of parties.

Political parties are intrinsic to Democracy. They can no more be prevented as can the will of the people be exterminated. When they are highly organized, however, they can retard the democratic character of the popular element, turning it ever more aristocratic. Whereas a pure Democracy operates by a mere counting of heads, the evolution of parties introduces a competition of wits and merit among the people, where the politically vigorous and clever will gain power at the expense of the politically apathetic or inept. The process can terminate in the complete destruction of the popular element if it becomes beholden to a single party with a single absolute leader, as roughly occurred in Germany when the Nazi party swept that nation into a dictatorship of its own autocratic monster.

THAT ELECTION LAWS DETERMINE THE NATURE OF POLITICAL PARTIES, AND HENCE, REGULATE THE EFFI- CACY OF THE CONSTITUTION'S DEMOCRATIC ELEMENT

The final structure and number of political parties derives axiomatically from the laws governing elections, regardless of how many opinion groups or factions there might otherwise be, and in spite of the erstwhile wishes of the parties themselves or the people. And since such laws determine the number and structure of political parties, they determine the efficacy of the democratic element as well, for this element acts through political parties. Through the political parties flows the democratic element's power of consent. Thus, in a very real sense, the democratic element's health and vitality depends on the laws governing elections. Since these laws essentially dictate the strength of the democratic element, let us review the various election laws which bear most heavily on the structure of political parties.

The electoral law with the greatest consequences as to the number and structure of political parties is the general method of electing governing officials. If officials are decided by lottery instead of election, parties will be vague tactical associations formed among the officials themselves, after attaining office, for the purpose of gaining the cooperation and support of other officials. Such parties need not seek popular support, for their tenure and power is unrelated to public opinion.

If, conversely, officers are chosen by voting, then parties will structure themselves so as to appeal to the people who vote. If the law holds that the candidate with the most votes wins, there will be few political parties, for those who command limited support will find it impossible to elect candidates, as their supporters will never amount to a plurality of votes cast. This forces minor parties to group together, otherwise they will never be able to command a plurality and elect a candidate. In this manner, the wide array of parties naturally forming among the people are ultimately consolidated into two giants, which wrestle with each other to gain a majority of the voters. Thus, plurality election rules create two-party systems by default, even if such is not an objective. Therefore, although such majority-rule election laws appear liberal and innocent-looking on their surface, in practice they result in extreme restrictions on the number of political parties. Plurality systems therefore drastically affect the constitution's democratic element. With only two political parties, the people have a very circumscribed choice in exercising their power to consent, being forced to support one of two parties despite any other wishes.

For this reason, plurality voting tends to create catch-all parties, and these often lack coherent or unified ideals. There being no alternative parties, the two existing parties will champion causes which would otherwise be the focus of smaller parties. Large parties thus develop into catch-all parties, sometimes with coherent plans for the whole of society, but more often with merely a collection myriad issues cobbled together for the sake of gaining supporters, without regard to ideological congruity. On the other hand, smaller parties may be tightly focused on a single issue, such as pollution, war, religion, etc., without having any overall comprehensive plan for the nation. In a two-party system, there will thus be an incentive, in theory, for the parties to develop comprehensive plans for the nation in order to accumulate the support of

these voting groups. This is a theoretical benefit of the two party system, which is to say, the plurality voting system.

Plurality voting also tends to create issue-less mudslinging campaigns. Under a plurality system, both parties attempt to attract the more numerous 'average voter' rather than the comparatively rare 'special interest voter,' since this will by definition yield them the greatest number of votes. By courting the average voter, they can gain the plurality they need in order to elect candidates. The result of this is that plurality system parties do not create grand visions or suggest radical ideas, but rather aim to advance uncontroversial opinions which are easy to digest and difficult to dispute. As each side does this, the distinction between the parties narrows until the voters perceive little distinction between the them. The only differences remaining are the personal variances among the candidates, usually relating to their biography or character. Thus, campaigns in a two party system raise few ideological issues and normally settle into character warfare. This is the inevitable result of plurality voting, and it often leaves the intellectual voters disillusioned. Accordingly, they participate in the elections less and less, increasing the importance of attracting the average and apathetic voter, and thereby intensifying the phenomenon of bland, issue-less politics and character attack campaigns.

This syndrome is further amplified by the tendency of two-party systems to deprive the electorate of a meaningful choice among policy alternatives. One party, usually the incumbent, summarizes its policy in light of its actions in office, and the other party runs against that policy, without needing to suggest a detailed alternative. Thus, the voters are given to make a blind choice in the event they reject the incumbent policy. They are not given a choice among two policies, but merely a choice regarding one. On the other hand, if additional parties were encouraged, all would be forced to advance policy alternatives in order to differentiate themselves from each other. Only in a binary system may the challenger differentiate itself without having to advance any policy at all.

If instead of a majority system, a proportionate election system is instituted, the opposite results are obtained, namely the number of political parties increases, and the focus of each becomes progressively narrow and specific. In a proportionate system, the number of legislative seats is distributed to parties according to the percentage of votes each party receives in the election. A party receiving five percent of the vote would receive five percent of the seats in the legislature, whereas under the majority system, this party would receive no seats at all, assuming that some other party received more than five percent of the vote. Thus, the proportional system rewards any party that can achieve even a small showing of support among the people. As a result, many political parties form and enjoy modest success, whereas these same parties could never command a majority and elect representatives in a majority system, wherein they would need to merge with other parties if they ever hoped to see sympathetic candidates in office.²²⁹

Under a plurality system, many parties are able to elect officials. As a result, there is very often no majority party; rather smaller parties band together to form coalitions which pursue common objectives. In this manner, plurality systems tend to create coalition governments by nature. Now, it is not always the case that coalition

²²⁹ Eagles and Johnston, *Politics: An Introduction To Democratic Government*, Part V, Chapter IX, Section III.

governments are unstable, although such is the stereotype. Still, coalition partners must make sacrifices and compromises in order to forge a coalition strong enough to implement objectives. Most importantly, these compromises are made after the elections are over; they are therefore back-room deals negotiated beyond the reach and control of the people. In this respect, coalition government entails a bargaining process among the parties which is immune to popular consent, at least until the following election. In majority systems, where two large parties must naturally emerge, these compromises and sacrifices are made while forming the large parties and are thus put before the people prior to the election. For this reason, the democratic element has more information upon which to base their consent in a majority, two-party system than in a plurality system. Unfortunately, under the majority system, the majority get over-represented and the minority under-represented, since even a fifty-one percent majority will have 100% of the representation, while the remaining forty-nine percent receive no representation. The proportionate system will yield the opposite bitter-sweet result: less electoral information but more equal representation of all voters. Some constitutions have used both systems, dividing the legislature into two houses based on alternate systems, or by allocating half of the seats on a majority and half on a plurality basis.

Another drawback of the proportionate system is the ease with which extremists can gain office. In a majority system, a lunatic fringe party elects nobody. But in a proportionate system with a large legislature, a minuscule core of supporters can put their fanatic in the legislature. Thus, the majority system somewhat homogenizes the political will of the legislature, engineering the 'rule of the average'. The danger of such mediocrity, however, is also a weakness of the majority system, casting plurality formats into better light, lunatic fringe and all.

The second most influential election law upon the nature of political parties is the candidate selection process. If the parties themselves choose candidates as they like, highly aristocratic systems *always* evolve and party leaders come to dominate the process. This syndrome results from the party's capacity to raise money for the candidates and assist in other aspects of their campaigns, like marketing and voter outreach. The power of the party elite is also reinforced by their control over appointments to lucrative government positions. A power of appointment always creates hues of aristocracy. The most senior office-holders of the party are the most likely to control such powers of appointment, for they will hold party and elective positions entitling them to make such appointments. Also, the senior office-holders tend to have the greatest fundraising ability, as they have more extensive and experienced fundraising machines. They also possess greater name recognition and social status. Thus, the senior office-holders tend to gain control over the candidate selection process if nature takes its course. This syndrome results in political machines, party bosses, and cronyism. With a power to choose candidates, a party elite can coerce and manipulate its members' acts and decisions throughout their careers in government, as the elite will always have a power to prevent the future candidacy of non-conformists. In this manner, parties formed by the people to enhance their consent power become tools of a party elite, who may use the parties and its elected officials to advance their own interests without regard to the peoples'. When such occurs, the voice of the democratic element is extinguished by the political parties it forms and aristocracy supervenes.

Such aristocratic tendencies naturally diminish the power of the people to exer-

cise consent in elections and thus injure the democratic element of the constitution. In order to prevent this aristocratic impulse, the device of a primary election is used, wherein the people themselves decide who will be candidates. After the people, instead of the parties, have made this choice, the people then vote in a general election to decide which of these candidates will become the elected official. Deprived of an ability to select candidates, the party elites are greatly disempowered and the parties become less aristocratic and therefore less noxious to the exercise of consent by the democratic element. In order to insure, however, that party aristocrats do not recapture control over candidate selection, related laws are introduced which govern the franchise for the primary election as well as who may run in it. To the extent that these laws aim to enhance the democratic nature of the election system, they will establish a very wide suffrage for primaries and a nearly voluntary system of primary candidacy. Still other laws must prevent opposition party supporters from 'raiding' and adulterating another party's primary election.

Nevertheless, many of the laws actually passed are aimed not at fortifying the democratic nature of elections, but rather at restoring the aristocratic power of the party leaders, most of whom will be the very legislators drafting these laws. They may place restrictions on primary candidacy which limit or hinder candidates without extensive party support, which may then be withheld or extended so as to regain control over who actually becomes a candidate. Similar restrictions are often placed on primary election suffrage, limiting the voters in primaries to those who have recently registered or re-registered to vote in such primaries, thus constricting the actual suffrage to people who are party regulars, party employees or zealots, and eliminating the vast majority of persons who are party supporters but lack the political stamina to register anew time and time again for each primary.

Limiting the suffrage to the industrious and dedicated has an interesting political effect, which applies not only to the primary election process, but also to the general election and the overall power of the democratic element as exercised through that process. It introduces hues of meritocracy into the election process. In such elections, the people do not speak; only the part of the people which most cares speaks. They claim this privilege against their fellow citizens on the grounds that they are better informed, have a stronger dedication, and should therefore carry more influence. Limiting the vote to those who take the trouble to constantly re-register or exert the other efforts related to voting indirectly makes their vote count more by making everyone else's vote count for nothing. The law which is most commonly enacted to prevent this is a mandatory voting law, requiring every citizen to vote or suffer some punishment. This eliminates the advantage given to the energetic voters in a voluntary system, eliminating with it the possible advantages of greater merit among the knowing voters as well as the possible vices of oligarchic voting.

It is easy to imagine the ills which might infest elections dominated by extremists, party employees of the loyalists of some powerful individual. The democratic element would turn oligarchic and upset the mixed constitution. It is correspondingly hard to imagine the benefits of limiting the suffrage to those who energetically seek it. But there is an attraction to such meritocracy of suffrage. It is instructive to recall the words of Hand:

Why must we hold altogether illegitimate the advantage that cohesion, assiduity and persistence bring in government as elsewhere? By

what right do we count those who have not the energy or intelligence to make themselves felt, equivalents of those who have? I have yet to learn that political masses must be weighed by counting molecules and disregarding atomic weights. In any society, I submit, the aggressive and insistent will have disproportionate power...In a world where the stronger have always had their way, I am glad if I can keep them from having it without stint...[through] a means not of counting heads, but of matching wits and courage...There must be a trying out of men, according to their qualities...²³⁰

Hand's words highlight the benefits of meritocratic structures in the democratic element's consent system. He is correct in noting that meritocracy will be there anyhow in some form; Still, whether it should be extended to the mechanism of elections by constrictions of suffrage is another question, one which depends on the overall balance established by the mixed constitution.

THAT EXTRA-CONSTITUTIONALITY RENDERS ELECTION LAW EASY TO MANIPULATE AND THEREFORE A SIMPLE AVENUE THROUGH WHICH TO DESTROY THE DEMOCRATIC ELEMENT.

Election laws, as we have seen, are integral parts of the democratic element's power in a mixed constitution; and the ease with which they can be changed presents a serious danger to constitutional balance. Election laws are usually general laws passed by the legislature rather than parts of the written constitution. As such, amending or eliminating them usually requires no more than a simple legislative majority, unlike constitutional changes, which normally require a super-majority and sometimes even collateral ratification. Consequently, it is far easier to cripple the democratic element by manipulating election laws than by attempting to change or subvert the written constitution.

Moreover, there is little interference in this area of legislation from bills of rights, which tend to address criminal procedure and freedoms of press, speech, association and religion. Thus, of all the ways to destroy the power of the democratic element, including censorship, mis-education, revolution, economic monopoly, and surreptitious amendment of the constitution by judicial interpretation, this may be the easiest to accomplish. It can be done by any majority party in any legislature at virtually any time, with a minimum of public scrutiny. The anti-democratic potential of election law is so ill-understood by the public that the most impetuous assault on the people can be undertaken with scarcely any risk that the masses might recognize the threat. Thus, the extra-constitutionality of election law renders it the most dangerously easy avenue through which to destroy the democratic element. Accordingly, these laws are best placed in the constitution itself, or enacted with appropriate entrenchment and double-entrenchment clauses.²³¹

²³⁰ Hand, *The Spirit Of Liberty*, Chapter 10.

²³¹ An constitutional entrenchment clause is a formal requirement of a super-majority vote to make any changes to the constitution. A double entrenchment clause applies this requirement to the entrenchment clause itself.

**THAT THE DEMOCRATIC ELEMENT CAN BE FURTHER IM-
PAIRED IF ITS ELECTED REPRESENTATIVES ENACT
ARISTOCRATIC PROCEDURES TO GOVERN
THE LEGISLATURE'S DAILY BUSINESS**

We must also note the ease with which the democratic element's influence can be destroyed by their representatives once elected. Representatives decide upon procedures and rules to govern the daily business of the legislature. These 'house rules' are nominally for convenience and order, but they actually create a hierarchy within the legislature rendering it far more aristocratic than would otherwise be the case. The influence of minority party and new representatives, for example, can be largely negated by a legislature's house rules regarding rights to speak, to hear issues, to sit on committees, and even to object to legislative proceedings. These rules, if not prescribed by the constitution, are changeable by the legislature on its own motion, with little check or balance. In this way, a small minority of representatives can eliminate the influence of those remaining, and by so doing, seriously impair the consent power of the people. Being so easily enacted and changed, such house rules pose a significant threat to the democratic element.

**THAT THE SEPARATION OF POWERS IS CONCEPTUALLY
SIMPLE BUT VERY HARD TO TRANSLATE INTO DURABLE
ELEMENTS OF ACTUAL GOVERNMENT**

As may be growing obvious from our prior discussions regarding the delicacy of the democratic element, the mixed constitution, while conceptually simple, is nevertheless complex when embodied by the raucous and dissembling institutions of actual governments. Powers separated on paper seldom remain so in practice. Once established, separated powers are loathe to obey the elegant symmetries of theory and rather tend toward a mutual usurpation and commingling; The creation and maintenance of the mixed constitution requires that the separation of the constituent powers be vigilantly preserved through the operation of effective checks and balances, such that each power is at once the master and the servant of every other. These checks and balances must be crafted with no less care and cunning than will invariably be deployed against them by the numberless agents of ambition, fear and greed.

The study of the separation of powers forms a field of constitutional law and requires a review of the factors which, obtaining among the powers so separated, operate to guarantee liberty. There is one principle common to the theories of economics and politics, that competition among people is the surest method of deriving and maintaining social benefits. Political harmony is but a result of struggle and disharmony, an equilibrium of unrest, without which mankind is mired in a placid morass of desultory and abject inertness. This theme will be examined in depth later, when we inquire as to the role of competition as a factor of social balance. At present, we must investigate the separation of actual powers, for as the theoretical distinction among the aristocratic, democratic, and kingly powers is easy, so is their translation

into actual institutions difficult. To fully appreciate the benefits to liberty which inhere in mixed constitutions, we must analyze with care the separation of powers, for liberty arises in constitutions only from this separation.

THAT THE SEPARATION OF POWERS DOCTRINE ADMITS OF A FUNCTIONAL CHARACTERIZATION.

We have already reviewed the ancient separation of powers theory, wherein the rule of one, some, and all are counterbalanced, blending Monarchy, Aristocracy, and Democracy. Although this was considered the only separation of powers for nearly two-thousand years, the enlightenment ushered in a new theory, penned by Montesquieu, relying on divisions between legislative, executive and judicial functions of government. The ancient theory was largely forgotten thereafter and Montesquieu's theory became orthodox. The ancient words survived, as many still speak of Aristocracy, Democracy, and Monarchy individually, but these ceased to be considered the basis of a separation of powers, unless by accidental equation with Montesquieu's functional theory. Montesquieu explained the new theory of separated powers as follows:

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from the legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor. All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.²³²

We have traced the roots of this theory to Aristotle's corrective and distributive justice, although nobody else has yet done so. Moreover, nobody offered these functions explicitly as a separation of powers until Montesquieu wrote the above words. The ancients indeed distinguished between legislative and judicial power, but they did not suggest that these be separated, rather merely that the government exercising them be a blend of Democracy, Aristocracy, and Monarchy.

The politically salient difference between the two separation of powers theories is that the ancient is based on class and the modern on function. The ancients were concerned with who ruled, the moderns, with how to rule. We are interested in both, however, and for this reason we analyzed both the ancient separation of powers theory and the ancient roots of Montesquieu's functional separation of powers, as found

²³² Montesquieu, *The Spirit Of The Laws*, Part II, Book XI, Chapter VI.

in Plato and Aristotle. We took pains to trace the nature of distributive and corrective justice, the former of which was determined to be legislative, and the latter judicial in nature, in order that Montesquieu's separation of powers would be fully comprehensible when we arrived at it. We carefully noted that injustice resulted from a corrective body's recourse to distributive justice, and likewise from a distributive body's recourse to corrective justice. This was done so that the nuances of the modern functional separation theory could be fully appreciated.

Despite their difference, the ancient and modern separation theories are often confuted. They are indeed linked, but not as many suppose. They are not the same thing—they are not synonyms. Executive power is not synonymous with the rule of the one. Legislative power is not synonymous with the rule of the many. The latter are class distinctions regarding *who* rules. The former are functional descriptions of *how* the leadership rules.

This shift in the focus from the ancient, class, or *per-capita*, separation to the modern, functional separation, causes no small degree of trouble, since ancient political writings are based on the per capita distinctions while the modern feature the functional. Political science and constitutional analyses from the time of Montesquieu, as familiar to lawyers, judges and scholars, has relied on the functional terms to the point that few know the ancient theory and still fewer know what to do with it.

Once again, these alternate theories of separated powers do not contain merely semantical differences; the terms are more than regalia. They intend disparate conceptions. The new nomenclature does not simply rename the original constitutional divisions, but reformulates them. Consider the following: We cannot say that the judicial power is by nature aristocratic. Nor can we say that the executive power is by nature monarchic. These new functional distinctions might each be embodied by a democratic, aristocratic, or monarchic institution; each could each be undertaken contingently by the rich, the middle class, or the poor. We will therefore need to look more deeply into the functional separation of powers in order see its distinctions for what they really are.

THAT IN POLITICS, ARISTOTLE'S MOTIVE CAUSE IS EXECUTIVE POWER

Like the legislative and judicial components of the functional separation of powers, the executive component also has its roots in ancient political theory. They are found in Aristotle's description of the efficient cause. Aristotle writes:

There are four recognized kinds of causes. Of these we hold that one is the essence [the formal cause] or essential nature of the thing (since the 'reason why' of a thing is ultimately reducible to its formula, and the ultimate "reason why" is a cause and principle); another is the matter or substrate [the material cause]; the third is the source of motion [the motive cause]; and the fourth is the cause which is opposite to this, namely the purpose or good [the final cause]; for this is the end of every generative or motive process...Most of the earliest philosophers conceived only

of material principles as underlying all things...But as men proceeded in this way, the very circumstances of the case led them on and compelled them to seek further; because if it is really true that all generation and destruction is out of some one entity or even more than one, why does this happen, and what is the cause? It is surely not the substrate itself which causes itself to change...wood does not make a bed, nor bronze a statue, but something else is the cause of the change...²³³

Thus did Aristotle explain the motive cause, also called the efficient cause, to which executive power in the constitution can be directly analogized. Executive power does not determine the form or the purpose of political things, nor their physical ingredients, but it brings them into being once these are determined by the other elements of the constitution.

The importance of denying this power to both legislative and judicial bodies is found in the desirability of rendering each them capable of ordering the people but still incapable of making themselves obeyed. Recall Montesquieu's observation: "When legislative power is united with executive power...there is no liberty, because...the same monarch or senate that makes tyrannical laws [may] execute them tyrannically...[and if judging] were joined to executive power, the judge could have the force of an oppressor."²³⁴

By thus confining institutional coercion to a separate body, the courts and legislatures are obligated to announce reasonable commands, lest they be thwarted in due course by a refusal of enforcement. It may be noted that while adjudication is governed by arithmetic equality and legislation by geometric equality, executive power is governed by strict equality, a one to one relationship between the law provided and that executed, as in the ratio of 1:1, assuming, of course, that the law received is just.

We must note, parenthetically, that after a constitution is ordained, all state action may take on an executive color when all parts of the government play their part in executing the written plan of the constitution, be they judging, legislating, or conventionally executing laws. When all parts of the government are simply doing what the constitutional law requires, they are executing it, and thus the entire apparatus can appear executive in nature. It is not actually executive, however, and while this idea seems related to the separation of powers, it is actually an unconventional method of discussing the concept of the rule of law, which we will discuss later.

THAT THE CONSTITUTIONAL FUNCTIONS OSCILLATE BETWEEN UNITY AND SEPARATION, FORMING A NATURAL CONSTITUTIONAL DIALECTIC.

Earlier, we delineated the revolutionary cycles of the *per-capita* constitutions, which we call the constitutional cascade. It is now time to note that the functional distinctions have their own cycle, beginning and ending with monolithic power, from which and into which all functions arise and collapse. Government power is initially a

²³³ Aristotle, *Metaphysics*, Book I, Chapter II, at 983a25.

²³⁴ Montesquieu, *The Spirit Of The Laws*, Part II, Book XI, Chapter VI.

monolith organized around legislative power. This monolith may subdivide itself into functional parts by hewing away the non-decisional duties, forming the executive, and by further cleaving away from itself the adjudicative duties, forming the judiciary. There is a natural tendency for this cleavage to take place, since human nature strives for maximization and this creates a tendency toward specialization. In the constitutional sphere, this specialization naturally occurs along the functional lines of legislation, adjudication, and execution. But the cleavage is naturally followed by a re-consolidation. Just as human nature prompts a separation of functions, in one instance out of ambition, in another out of laziness, so does it mandate a consolidation of the disparate parts in order to bring them under an individual will. Thus do the various functions tend to recombine, the progress of which is ultimately determined by and in favor of the legislative function. In this way the legislative monolith is reestablished. This process is not precisely a functional cascade, but rather an oscillating or dialectical progression between functional oneness and manyness. This is hinted at by Madison in *Federalist* Number 51, where he notes that legislative is the strongest of the separated powers and must be restrained by subdivision and external veto powers in order to prevent its masticating the other functions. Thus, Madison was aware of the consolidative phase of the constitutional dialectic, although he made no mention of the fragmentive phase. He dealt with the second half of the dialectic only.

Intrinsic to the notion of the constitutional dialectic is the recognition that legislative power is the alpha and the omega of the process, and as such, it can be seen as prior to executive and judicial power. This priority exists on two levels, that of actual practice and that of pure theory. Legislative power is prior to executive and judicial power in actual practice for no law can be executed or applied in judgment until it is indeed made. The formation of the law naturally precedes its execution or use as a standard for judging. Plainly, legislation must occur before any execution or judgment can take place.

On the higher plain of theory, however, legislation is still prior to execution and adjudication. Legislation is the formal cause of the law, it defines the law's essence. Execution is merely the motive cause of the law, the force which causes the form of the law to become wedded and commingled with the physical world. Lastly, adjudication is but the comparison between the actual essence of the law and various potentially similar parts of the world. This distinction of priority between legislative, executive, and judicial power is directly analogous to Aristotle's discussion of priority among potential and actual things in his *Metaphysics*, but applied to formal and material causes.²³⁵

Therefore, we may conclude that every constitution is subject to the pressures of both the constitutional cascade and the constitutional dialectic, and the stable constitution must contain a separation of powers capable of thwarting both.

THAT THE ANCIENT AND MODERN SEPARATION THEORIES RESOLVE INTO A COMPOUND SEPARATION OF POWERS

As we have noted, most scholars believe that the modern separation of powers is right and the ancient wrong, but actually both are correct and interrelated. When Montesquieu explained that the ideal separation of powers was really a division of

²³⁵ Aristotle, *Metaphysics*, Book V, Chapter XI, at 1019a10.

government into separate legislative, judicial and executive departments, his formulation was considered definitive and Aristotle's ancient idea of mixing Monarchy with Aristocracy and Democracy was discarded. But this was a mistake, as both theories are correct. The ancient theory concerns who rules, and the modern concerns how. The modern and the ancient theories, separating government by function and class respectively, resolve into a compound theory, their precise interrelationship being one of the great secrets of ideal government.

Before we demonstrate how the two theories are interrelated, however, we must reiterate the following: The wrong way to combine the theories is to assume that they are the same thing. The functional categories cannot be mere synonyms for the class-based. The rule of one, some or all, (Monarchy, Aristocracy, and Democracy respectively) does not simply translate into executive, legislative, or judicial power. This is because the former identifies *possessors* of power whereas the latter *distinguishes among types of power*. For example, despite the fact that executives should be monarchic and legislatures and judiciaries aristocratic, it may fall out that the executive is aristocratic and the legislature a single individual. For this reason, we must recognize that the modern separation of powers is not simply the ancient disguised under new names, and combining the theories requires us to look beyond simply equating the two.

THAT HARMONIC CONSTITUTIONS ARE BEST: THOSE FEATURING AN HARMONIC MEAN OF SIX SEPARATED POWERS

We will now show how the two separation of powers theories, the ancient based on classes, and the modern based on functions, correlate. The secret is as follows. The powers of a state must be separated such that the functional divisions are related to the class divisions as aliquot harmonic conjugates. As this is confusing, let us review the logic and purposes underlying each of the two separation theories and then apply algebraic, geometric and harmonic means thereto. In this way the harmonic constitutional arrangement can be most easily understood.

Under the ancient theory, we want to insure that no one "class power" is able to subvert and dominate the other two, that Democracy, for instance, cannot defeat the aristocratic and monarchic classes. Under the modern theory, we want to make sure that the government formed from this class-balance is itself divided such that the legislative, executive and judicial entities cannot perform one another's roles. Thus, we in fact want both separations of powers to exist, the ancient one for the state as a whole, and the modern one for the part of the state which is the government. These two triple-separations bear a unique and fixed relationship to each other: they form an harmonic proportion.

Before looking directly at that proportion, consider the following: For the power of the democratic to resist the aristocratic and monarchic factions, it must be more than one-third of the combined strength of all three, as it is the weakest of the three, being more disorganized and divergently directed. It must therefore have more gross power than either of the other two. Moreover, the aristocratic faction is relatively weaker than the monarchic for the very same reason, namely, it is less organized and concentrated. Therefore, it must, in turn, have relatively more gross power than the

monarchic faction although less than the democratic. In this manner, these three constitutional elements will be balanced.

But what are the exact ratios of this proportion? Certainly, the health of the state depends upon the operation of consent, as we have seen earlier, and this is the operative force of the democratic element. Moreover, the aristocratic and monarchic factions both have an equal incentive to attenuate or destroy this consent power and thereby negate the democratic element. Thus, the democratic faction must have a gross power equal to that of the monarchic and aristocratic factions combined, it standing in proportion to them as half to half. (It will not be able to overthrow the aristocratic and monarchic factions, but if it does, the result is relatively better than any domination by the others, since Democracy is the best of the pure, worst constitutions.) The democratic half will thus be strong enough to resist the natural urge of the other half to overthrow it, this other half being composed of the aristocratic and monarchic factions, but it will not be strong enough itself to overthrow them. These latter two factions, so far as we have deduced already, are not equal to one another, though they jointly compose half of the whole. Rather, the aristocratic must have relatively more gross power than the monarchic faction. Thus, the democratic is one half, the aristocratic is less than half but more than one fourth, and the monarchic less than one fourth. How much more or less will become clear upon analyzing the second separation of powers theory, for its divisions are in harmonic proportion with these first divisions. It may be argued that the democratic power, as half the whole, could combine with either remaining power and subjugate the third. This cannot happen, for reasons to be explained shortly.

The second theory of separated powers requires that the three functions of government be equally balanced against one another. The judicial, executive and legislative functions must be equally powerful in respect to one another, each being one-third of the whole power of the government. But we have already noted that two of these are ideally aristocratic and that one is monarchic, which means that the proportion of aristocratic power to monarchic power is naturally in the ratio of two to one. This proportion then clarifies the proportional relationship between the aristocratic and monarchic powers in the first separation theory, since we know that these are now proportioned two to one. To summarize then, the proportions among Democracy, Aristocracy and Monarchy are 3:2:1, and the proportion of judicial and legislative power to executive power is 2:1. Since these last two are aristocratic and monarchic respectively, they accord with the first proportion, 3:2:1, being the latter two of those three. Moreover, since the latter two separately constitute three equal shares and divide into three parts, the aristocratic faction bifurcating into the judicial and legislative, the judicial, executive, and legislative become equally balanced with respect to one another. Thus, the functions are in mutual balance, as 1:1:1, while still adhering to the proportionality among the classes of 3:2:1, wherein Democracy is half the power, so as not to be overbalanced by the combination of its adversaries, who will form the government.

It may be argued that the democratic power, as half the whole, could combine with either remaining power and subjugate the third. This cannot happen, for the democratic faction takes no active role in the government, which is monopolized by the other two subject only to its consent. Thus, the democratic power cannot achieve this subjugation because it has no governmental power of its own, and when it attempts to exercise such power, it must do so by delegating it to the very factions it seeks to de-

stroy. The other two must then fight it out with each other, the aristocratic itself being subdivided into judicial and legislative, such that three equal opponents confront each other in a mutual balance.

This arrangement is, by coincidence or fate, exactly the relationship described by what is called an harmonic proportion. The six-fold division of powers we have traced, between Aristocracy, Monarchy, Democracy, the executive, the legislative, and the judicial, is a perfect harmonic division. This is not surprising, since, as we have already noted, all justice is found in a mean of some kind. In the context of legislation, justice is found by applying a geometric mean. In the context of adjudication, justice is results from the application of an arithmetic mean. In the context of constitutional design, justice is a found by applying the harmonic mean.

An harmonic mean is, algebraically, the reciprocal of the arithmetic mean of the reciprocals of two or more quantities. In geometric terms, it is the division of a line segment at two points which internally and externally produce the same ratio. A picture of this helps. Imagine the line ABCD, where A-D is divided into six equal segments. Portion A-B is three segments long, portion B-C is one segment long, and portion C-D is two segments long. ($A \cdot \frac{1}{3} = B \cdot \frac{1}{1} = C \cdot \frac{1}{2} = D$) In this line, the following proportion obtains, namely, line A-C-D is exactly the same proportionally speaking as D-C-B. In fact, A-C-D is D-C-B flipped around and doubled. $AB:BC:CD$ is the ancient class-based, or "*per-capita*" separation of powers, which is harmonically proportionate to $D:C:B$, the smaller modern, governmental separation of functional powers. To see this, let national power be A-D, the whole line. Then notice that A-B is $\frac{1}{2}$ of it. A-B thus represents the democratic power, which is $\frac{1}{2}$ of the whole power. The remaining half, B-D, is government power. Next, note that B-C is $\frac{1}{6}$ of the whole power, or $\frac{1}{3}$ of the remaining half, representing the monarchic power. C-D is $\frac{1}{3}$ of the whole, or $\frac{2}{3}$ of the remaining half, thus representing the aristocratic power. Thus, the aristocratic power and monarchic power combined are B-D, half of the whole power, unable to overpower Democracy, which was A-B, also half of the whole. Finally, note that aristocratic power is double the monarchic power, exactly as is required by the separation of government functional powers wherein aristocratic powers of legislation and adjudication are each $\frac{1}{3}$ of the total government power, as is the monarchic executive power. Thus, the harmonic proportion holds, $A:C:D::D:C:B$, and all six separated powers are perfectly counterbalanced.

In this manner, it becomes clear that both alternate formulations of the separated powers, the ancient and the modern, the *per-capita* and the functional, are both correct and apply at the same time according to an harmonic mean. Let us take special note of the fact that the harmonic mean implies that the governmental power must be exactly half the national power. This is correct, for we do not want the power of the government, as agent, to be stronger than that of the democratic element, its principal. We want neither the government able to throw the people nor the people to throw the government. Stability can only be found in an equality between the two. Only the harmonic mean described herein provides this equality and at the same time allows for a triple-mixed Republic of separated functional powers.

THAT THE JUSTICE OF GOVERNMENT IS FOUND IN AN HARMONIC MEAN

Some may be perplexed by the assertion that the ideal structure of government is found in a mean of any kind. However, all justice is found in a mean. The justice of adjudication is an arithmetic mean. The justice of legislation is a geometric mean. The justice of constitutions is an harmonic mean. When ideal government is viewed from the perspective of a quest for justice, the fact that such justice should be found in a mean of some type is actually quite obvious.

The harmonic mean represents the truest, most complete and most balanced separation of powers possible. Some may ask where this leaves Democracy, which is so often held up as the greatest form of government. The utility and necessity of the separation of powers has already made it clear that mankind's cherished ideals of peace, freedom, liberty, and prosperity are not the children of Democracy. By itself, Democracy could produce none of these. Rather, they are the children of the mixed constitution, in which Democracy plays only a part. Only when Democracy is viewed from the perspective of the harmonic constitution do the taller riddles of Democracy become understandable, like the paradox of 'freedom with equality' (how can one be free to be unequal and still enjoy equality?) and the paradox of political participation with efficiency (how can everyone have their say and not stifle efficient government?) The institution of Democracy is but a component of a larger system which forms the ideal government. It is mankind's failure to see this and his tendency to cram the combined attributes of the larger, harmonic system into the lesser notion of Democracy that has rendered it often dysfunctional. As we noted before, Democracy, or the rule of all, is a slippery term, for its definition has been twisted. We have reviewed its true definition already. Here, let us note that Democracy is not the savior of mankind, but it is a part of it. The true savior is an harmonic constitution. Later, we shall see that it also supplies the answer to the question "where" governments should rule, but this idea must wait until we discuss federalism.

The harmonic constitution is not a 'new' constitution, it is a theoretical framework for a constitution; *it is a constitutional meta-theory*. It is neither reactionary nor revolutionary, but rather a super-formula within which a great number of constitutions could be designed. The harmonic constitution answers and supplies with proportions the two basic questions of *who* should rule *how* they should rule. Who should rule can be answered in three basic ways: one person, some of the people, and all the people. How they should rule can again be answered in three ways: by making, enforcing, and judging laws. The harmonic mean prescribes the ideal proportions among these six elements.

THAT THE HARMONIC CONSTITUTION IS CUBIC

We described the ancient mixed constitutions as double, triple, and mega-mixed. Likewise, one might consider the harmonic constitution to be cubic. The cube has six equal sides, and each can be imagined to correspond with some element of the harmonic constitution: three being democratic, two, aristocratic, and one monarchic, the aristocratic being one judicial and one legislative, the single monarchic face being executive. The idea of a cubic constitution is allegorically fitting as well, for one can

only see half of a cube, three top-sides, at any given time, which corresponds to the difficulty of conceiving at the same time of the ancient and the modern power-separation theories. Both have three equal parts, like the visible surface of the cube, both are part of a larger balanced entity, and both must be considered concurrently in order to comprehend the balanced whole. When we discuss federalism and fractal geometry, we shall see how these cubes stack together. Thus, although we call this the harmonic constitution, there is no reason why it might not also be referred to casually as the cubic constitution.

THAT THE HARMONIC CONSTITUTION EPITOMIZES THE IDEAL OF JUSTICE SOUGHT OUT BY PLATO IN THE *REPUBLIC*.

Plato wrote the *Republic*, an odyssey into the ideal of justice. Interestingly, his ideas therein regarding political justice accord with our theory of the Harmonic constitution. We say this for two reasons. First, Plato posits a constitutional blend of functional and class separations of powers, which are the very two ingredients of our harmonic constitution, a coincidence we shall discuss immediately. Second, and more intriguingly, Plato mapped out the exact mathematical structure of the harmonic constitution in his so-called ‘riddle of the nuptial number.’ As this is more arcane, we will defer this until after discussing Plato’s coincidental use of the two harmonic ingredients.

As we have said, Plato posits elliptically that the ideal constitution is, under the circumstances, a blend of functional and class separations of powers. As these are the very two ingredients of the harmonic constitution, we are naturally relieved. In the *Republic*, Socrates, Glaucon, Adeimantus and the rest posit an imaginary state, their goal being to glimpse by analogy the phenomenon of justice or injustice in the individual soul. It was their belief that such an exercise would help them understand what justice in mankind truly is.²³⁶ Together, they adopt a division of labor for this state, Socrates remarking that “more things are produced, and better and more easily when one man performs one task according to his nature, at the right moment, and at leisure from other occupations.”²³⁷ The city they design goes through many stages, being at first a city without luxuries, next a city diseased by such, and eventually a city purged of the maladies introduced by luxury.²³⁸ The people are raised into classes, and government is formed from among the wisest class, the guardians.²³⁹ Socrates then leads the group to see that the state will itself be wise if led by the wisest, though remaining people need not be wise in any political way; that the state will be sober if its higher part rules over its lower part, namely if the wise few rule over the ignorant masses; and that the state will be just if each person, ruler or ruled, high or low, does strictly

²³⁶ Plato, *The Republic*, Book II, 368 E.

²³⁷ Plato, *The Republic*, Book II, 369 E.

²³⁸ Plato, *The Republic*, For the city of pigs and the city with a fever see Book II at 372 D, for the fevered-city cured, see Book IV at 427 D.

²³⁹ Plato, *The Republic*, Books II-III, 374 E-413 D.

his own task.²⁴⁰ In this way, Plato holds up division of labor and class separation as the essentials of political justice, for these allow the whole to be led by the wisest part and they insure the skill of the government.

This is but a fragment of Plato's voyage through political and personal justice in the *Republic*. But we see in it the essence of what we have said with more specific elaboration, that the holy grail of justice is a separation of powers, and specifically that the classes and the functions must both be separated, as per the ancient and modern separation of powers theories respectively. This seems to accord perfectly with Plato's more general conclusion that justice consists in the higher ruling over the lower and each doing his own task, for the former is a *per-capita* separation of powers while the latter is a functional separation.

Granted, we have gone far beyond Plato in devising the Harmonic constitution and its intricate proportions. We are not contending that Plato directly proposed or even conceptualized the harmonic constitution. We are only pointing out that what we have theorized is in close accordance with the general structure of political justice outlined in the *Republic*. Some may argue that we are reading into Plato things which he never intended; then so be it. We are not alarmed. If the moon looks like a rabbit, we have no misgivings about discussing the rabbit, whether someone intended it to be there or not, and if Plato's theory looks like a rough harmonic constitution, again, we have no misgivings about noting the similarity, whether he intended it or not. We conclude this observation by noting that Socrates believed political sobriety, as explained above, *to be a kind of harmony*.²⁴¹ We do too, and we call this harmony the Harmonic constitution.

THAT THE HARMONIC CONSTITUTION IS PROBABLY THE ANSWER TO PLATO'S RIDDLE OF THE NUPTIAL NUMBER IN THE *REPUBLIC*.

As we explained above, although we are the first to have directly proposed the harmonic constitution as a constitutional formula, we believe that Plato probably articulated its human analogue in the *Republic* and thus first implied indirectly, by reverse analogy, its use as a political constitution. This section of the *Republic* is often referred to as the riddle of the 'nuptial number,' and for reference, we shall quote it at length:

Now for divine beginnings there is a period comprehended by a perfect number, and for mortal by the first in which augmentations dominating and dominated when they have attained to three distances and four limits of the assimilating and the dissimilating, the waxing and the waning, render all things conversable and commensurable with one another, whereof a basal four-thirds wedded to the pempad yields two harmonies at the third augmentation, the one the product of equal factors taken one hundred times, the other of equal length one

²⁴⁰ Plato, *The Republic*, Books IV, 428 A-433 E.

²⁴¹ Plato, *The Republic*, Books IV, 431 E.

way by oblong—one dimension of a hundred numbers determined by the rational diameters of the pempad lacking one in each case, or of the irrational lacking two; the other dimension of a hundred cubes of the triad.²⁴²

In his introductory comments to the *Republic*, Shorey has several interesting remarks regarding this passage:

‘The riddle of the ‘nuptial’ number that determines the beginning of the decline [and revolution within constitutions] has never been solved to the satisfaction of a majority of competent critics. The solution would contribute something to our knowledge of early Greek mathematical terminology, but nothing to our understanding of Plato’s thought. Emerson’s definitive word about it is ‘he (Plato) sometimes throws a little mathematical dust into our eyes.’²⁴³

We concede that this riddle has, until now, gone largely unsolved, and that many believe it to be nonsense or garbage. It is, however, an extraordinarily important concept of political theory, despite its casual dismissal by Shorey and Emerson. We regret with embarrassment that these men did not search more thoroughly for the meaning of the nuptial number, since we are convinced that every syllable of Plato’s writing is imbued with reason and meaning, and that no parts are gratuitous or meaningless. We agree with Craig, who so wisely wrote of Plato that:

...[A]n assumption of literary perfection is a prudential judgment, and it is not made for the sake of honoring (much less revering) Plato—justifiable though this may be—but rather for the sake of the reader’s getting the most for himself, and of himself, of what Plato wrote. For if one assumes the contrary: that the dialogues are flawed...one thereby provides oneself an ever-too-ready explanation for anything one does not understand about them, but which one might if one but persisted. Of the only two alternatives, far better for oneself to assume...that in the Platonic kosmos everything has a cause, and if one does not at first see what it is, one must try, try again...for the causes of things are often deeply buried.²⁴⁴

This perfection is what we always assume when analyzing Plato. Moreover, as we have said before, this court is not obsessed with what Plato may have subjectively intended. If the moon looks like a rabbit, we have no misgivings about saying so, and we do not care whether anyone intended it to look so; and if the nuptial number in the *Republic* describes an harmonic constitution, again, we have no misgivings about saying so, whether Plato intended it or not. Like a rabbit in the moon, the harmonic constitution is in Plato, though he perhaps did not intend it. Therefore, let us now proceed to explain why we construe the nuptial number to be the harmonic constitution.

²⁴² Plato, *The Republic*, Book VIII, 546 B-D.

²⁴³ Plato, *The Republic*, Introduction, p. xlv.

²⁴⁴ Craig, *The War Lover*, Prologue.

The harmonic mean is, recall, the reciprocal of the arithmetic mean of the reciprocals of two or more quantities. The riddle of the nuptial number is really the harmonic mean because: “augmentations dominating and dominated” means the reciprocals in the above definition; “three distances” means: Distance 1, that falling between the two ‘quantities’ in the above definition, distance 2, that between the larger of these two quantities and the whole, and distance 3, that from the whole to the harmonic magnitude; “four limits” means: limit 1, the first quantity, limit two, the second quantity, limit 3, the whole, and limit four, the harmonic quantity. “Of the assimilating and the dissimilating, the waxing and the waning,” means the ‘less and greater’ than the whole in question, the bigger and smaller than the whole, which allows for an harmonic quantity. “Rendering all things conversable and commensurable with one another” means related as aliquot parts; this is a complete description of the algebraic formula for the harmonic mean.

The next portion of Plato’s definition refers to the geometric shape of the harmonic mean. Recall that in geometric terms, the harmonic mean is the division of a line segment at two points which internally and externally produce the same ratio, as in line ABCD, where A-D is divided into six equal segments. Portion A-B is three segments long, portion B-C is one segment long, and portion C-D is two segments long. (A***B*C**D) Recall that A-C-D is D-C-B flipped around and doubled. With this in mind, it is obvious that “whereof a basal four-thirds” means line B-D divided by Line AC, (which is four-thirds); “wedded to the pempad” means connected at the $\frac{1}{3}^{\text{rd}}$ of the B-D which overlaps the $\frac{1}{4}^{\text{th}}$ of the A-C; “yields two harmonies at the third augmentation” means there are two harmonies, one at each extreme of the algebraic limits, (limit 1 and 4), each a multiple of some three constituent segments. The first such harmony is the amount of limit 2 minus limit 1, then *multiplied by three*, which results in limit four, the harmony. The second harmony is limit four less limit three, *multiplied by three*, which equals limit 1, the other harmony.

Of these two harmonies, the first is “the product of equal factors taken one hundred times,” meaning that limit four is susceptible to perfect factorial division, which is the key to determining by implication the original quantities we have called limits 1 and 2; The second harmony is “of equal length one way by oblong—one dimension of a hundred numbers determined by the rational diameters of the pempad lacking one in each case, or of the irrational lacking two; The other dimension of a hundred cubes of the triad” describes the relationship of line segment B-C-D being D-C-A flipped around and doubled. It is oblong because the harmonic exceeds, or falls beyond, the whole. “Lacking one in each case” is the pempad connection at the overlap of B-D and A-C, namely B-C. “The irrational lacking the two” refers to the case where algebraically, only one harmonic is named.

The riddle of the nuptial number was used by Plato to describe the correct birth of leaders, persons with perfect constitutional balance in their souls. However, Plato analogizes the constitutions of the soul with those of corresponding states, therefore, the harmonic soul, must, by reversing Plato’s analogy, correspond to some political constitution. It is for this reason that we believe Plato actually to have posited the harmonic constitution before us, although in a most obscure and heretofore undeciphered passage.

Despite our belief that this correctly interprets the nuptial riddle, we are unwilling to take judicial notice of this fact, and therefore, we shall state only that the harmonic constitution is probably the answer to Plato’s riddle of the nuptial number, for we are not certain.

THAT THE HARMONIC CONSTITUTION REUNITES ARISTOTLE'S DIVISIONS OF SOCIAL JUSTICE.

Harkening back to Aristotle's divisions of justice, we can now see that his two-fold division of social justice into *political* and *particular* justice has been honored in the harmonic constitution. This is because the ancient separation of powers is based on the distinctions made between selfish and self-less laws within the area of political justice, while the modern separation of powers is based on the distinctions between corrective and distributive justice within the field of particular justice. The harmonic constitution uses both of these as it unites the ancient and modern separations in its single six-fold formula. It blends Aristotle's fields of *political justice* on the one hand and *particular justice* on the other. A constitution based on the one without the other lacks critical aspects of *social justice*, as defined by Aristotle. The harmonic constitution provides at the same time the political justice of laws with the particular justice of separated legislation and adjudication. For this reason, we say that Aristotle's two-fold division of social justice into *political* and *particular* justice has been recombined in the harmonic constitution.

We do not mean to imply that no modern came close to identifying the harmonic constitution. Montesquieu in particular seems to have named all the elements in one sentence, and hence he may, in French, have spelled out the harmonic constitution within a translator's margin of error when rendered in English: "All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals."²⁴⁵ Montesquieu named five of the six harmonic elements, neglecting only the monarchic, which he may have considered part of the nobles. It is reasonable to suppose that the King was a noble. If he were not noble, indeed, who would be?

THAT THE OPPONENTS OF THE HARMONIC CONSTITUTIONAL IDEAL ARE BY DEFINITION SUPPORTERS OF IMBALANCE, CORRUPTION, AND TYRANNY

If the harmonic constitution is attacked as an incorrect theory by those who support its objectives, this can only mean that its opponents prefer the removal, substitution, or addition of some element or elements. On the other hand, if the harmonic constitution is attacked as *bad format of government*, this can only mean that its opponents prefer a different ratio among the elements. The former attack, though without firm basis in the history of political thought, may be fair; there is no limit to human ingenuity. The latter criticism, however, can only mean that the opponent is unhappy with the idea of balance per se among the elements and prefers rather imbalance in favor of some over others. Any alteration which upsets the harmonic ratio, however, will produce imbalance, followed eventually by tyranny and revolution. Thus, opponents of the harmonic balance are proponents of tyranny of some sort, usually in favor of themselves or their element. For example, radical democrats will

²⁴⁵ Montesquieu, *The Spirit Of The Laws*, Part II, Book XI, Chapter VI.

demand the reduction of all elements except the democratic. If the harmonic constitution is premised on balance, any relative alteration of the class elements results not only in class imbalance, but imbalance between the people and the government. Imbalance ultimately entails degeneration into perverted government and finally destructive revolution. Therefore, the opponents of the harmonic constitutional apportionment are by definition supporters of imbalance, corruption, and tyranny.

THAT A CONSTITUTIONAL BILL OF RIGHTS ENHANCES THE STRENGTH OF THE DEMOCRATIC AND JUDICIAL ELEMENTS OF THE HARMONIC CONSTITUTION.

Identification of the harmonic constitution allows us to understand more perfectly the device of a constitutional Bill of Rights. When a constitution contains a bill of rights, or a positive list of specifically prohibited government actions, the democratic and judicial elements are empowered. It is easy to see why the democratic element is empowered by a bill of rights, since it is usually named the beneficiary of such rights. For instance, a bill of rights will normally state that no *person* shall be subject to thus and such law, or that the *citizens* shall not be deprived of thus and such right or ability. This directly enhances the power of the citizens, which means the democratic element.

A bill of rights will, then, naturally empower the people. However, *it will also empower the judiciary*, and this point is critical, for it makes the adoption of a bill of rights a matter of far greater utility than is commonly perceived. Each article in a bill of rights provides to the judiciary a positive standard with which legislation may be reviewed and invalidated. The bill of rights supplies an array of grounds for judicial review and rejection of legislative efforts, without which the court would have no basis for objection besides construction, inference, and implication, the vagaries of which invite the court to usurp legislative power every time it employs them. The bill of rights thus not only enhances the power of the Judiciary to perform judicial review of the legislature, reducing the chances of legislative overstep, it also reduces the potential for reciprocal judicial usurpations of power, which would otherwise answer such legislative license.

Admittedly, it has been argued that a positive enumeration of such rights of the people against the government may tend to diminish their actual safety and accidentally augment government power, for such lists may imply that no other prohibitions exist and may consequently introduce into government a license which would scarcely be defensible otherwise. Such a construction, however, renders the other portions of a constitution meaningless, for if the contours of government power are exclusively defined in the negative by a list of prohibitions, it becomes irrelevant and unnecessary to add thereto any positive description of government powers; and the remainder of the constitution is just such a positive description. Thus, any view that a bill of rights in favor of the people injures them by granting license to the government in unlisted matters renders the entire balance of the constitution nonsensical. Therefore, such a criticism cannot be taken seriously.

Thus, the bill of rights enhances both the democratic and judicial elements of the constitution. Only the harmonic constitutional model can account for this phenome-

non and show the relative impact on the separation of powers occasioned by the introduction of a constitutional bill of rights. This is because only the harmonic constitution contains both a democratic and a judicial element; the other models, ancient and modern, each have one but not the other of these two elements. Thus, we can begin to see how the harmonic constitutional framework is a valuable lens through which to view politics.

Parenthetically, we must also note that the bill of rights has the counterintuitive but real effect of empowering political minorities, which are usually the people but may on occasion be the aristocratic element. It has been said that liberty consists in the degree to which political minorities are protected in a system of government, and this sentiment is echoed in Madison's description of the tyranny of the majority and his methods for protecting minority factions therefrom.²⁴⁶ As Madison explains, the separation of powers, especially as created by federalism, is a key device in protecting the minority from such majoritarian tyranny, a tyranny we are wont to call 'majoritarianism.' The bill of rights, however, can be seen as accomplishing the same thing, for it protects the individual, the *ultimate* minority. Thus, the bill of rights and Madison's *Federalist* No.10 both aim at the same object, namely the preservation of political minorities. This being the case, it is easy to see that the bill of rights may protect the aristocracy when it is the political minority. If the power of the people becomes overbalancing in the constitution, the bill of rights operates to protect the aristocracy from a popular annihilation of its rights. This distinction is only important insofar as we must concede that the bill of rights, under certain circumstances, can empower the aristocratic element of the constitution, and not the democratic element. The bill of rights, then, can be a natural counterbalance to any majority power, a ballast force in constant counterpoise to whichever element tends to predominate in the harmonic constitution.

THAT SAFEGUARDING THE POPULAR ELEMENT REQUIRES BRINGING THE MONARCHIC AND ARISTOCRATIC CLASSES INTO COMPETITION WITH THEMSELVES.

In order for the harmonic separation of powers to function, the aristocratic and monarchic elements must be kept in check, as we have already noted. This may be done by the maintenance of an equal and offsetting popular power. However, to make this balance reliable, the aristocratic and monarchic elements must be placed in a state of natural deterioration and disintegration. Being thus engaged in constant struggle to preserve themselves, they will not be able to undertake the exploitation of the people. This competition must be fostered by policies aimed at threatening the incumbent Aristocracy with an ever rising crop of upstart aristocrats, who eventually unseat the incumbents and are themselves, in turn, unseated by yet new aspirants. The effects of income and estate taxes plus the redistributive machinery of government accomplish this, but often in an excessive and wasteful manner. Often, the ultimate power of an aristocrat is not financial, but rather consists in the goodwill associated with their family name. This goodwill must be subjected to

²⁴⁶ Madison, *The Federalist On The New Constitution*, No. 10.

artificial erosion, particularly in the context of political goodwill, if an Aristocracy is to be prevented from gaining and holding a political monopoly indefinitely. The aristocratic class must be dynamic. Families must rise and fall with regularity. Not only does this internally weaken the aristocratic element of society, it energizes and strengthens the will of popular element, the masses, who aspire to become aristocrats. Capitalism itself, when kept maximally competitive, achieves this effect admirably, as does, incidentally, the increase in divorce rates. This class dynamism not only aids in balancing the separated powers, but as Veblen noted, it eases the economic and political antagonism between the poor and rich, an antagonism which, if improperly managed, can end in revolution.²⁴⁷

The power of political goodwill, especially name recognition, has always been strong, but it has been further enhanced by modern communications technologies. In Rome, the surname of Cornelius was political gold; and as surely as that name saved Rome, it eventually ruined her. Cornelius Scipio defeated Hannibal, saving the Republic. His family name endured and produced a line of public servants as surely as rich soil bears fruit. And the power of his name enabled the rise of Cornelius Sulla, who's tyranny sealed the destruction of the Republic. Octavian obtained power by calling himself Caesar. In American history, the Kennedy name produced a national adoration which lasted most of the twentieth century. A Kennedy could often be elected to office over other aspirants simply on the basis of name-power. The advent of high technology and the mass-media may yet increase the power of such name-derived political goodwill. Someday, drastic measures may be needed to eliminate the threat to a balanced constitution which such power brings, for it leads to a permanent Aristocracy, unshakable but by revolution. In ancient Athens, the overweening power of a wealthy aristocrat was counteracted by simple exile by vote of ostracism. This may be a dangerous and foolhardy extreme. Nevertheless, there may be need to deny descendants the use of a name if such is invested with too great a quantum of political goodwill. The change of appellation will entail a loss of political goodwill, and yet will not prevent the re-named from correlating himself with the old name. Jackie Kennedy became Jackie Onassis, and her image as a Kennedy remained long into posterity. However, an Onassis *per se* lacks the political goodwill of a Kennedy, and thus Onassis children had to compete for political power, whereas the same generation of Kennedys had a great deal of political power merely handed to them.

It is therefore wise in Republics to have constitutional rules forbidding the election of officers who have or use the name of any previous Chief Executive, legislator, Supreme Court Justice, or high-ranking military or naval commander. These aspirants should be forced legally to change their name from before the primary until the end of their term of office. In this manner, the effect of Aristocratic name-goodwill would be reduced to a level more compatible with a balanced constitution. This is, perhaps, the one exception to the rule that re-naming accomplishes no reform. This is a concept which, however, would need to be carefully reconciled with the principles of free speech and substantive due process, as will be discussed later. We also note that aristocratic forces are further restrained by the device of electoral and appointive term limits. Term limits spread the few political offices over a wider portion of the aristocratic element, allowing it to expand by admission of new entrants.

²⁴⁷ Veblen, *The Theory of the Leisure Class*, Conspicuous Leisure.

THAT PARLIAMENTARY GOVERNMENT ABANDONS THE SEPARATION OF POWERS AND IS THEREFORE AN UNSOUND AND UNJUST SYSTEM OF GOVERNMENT

Although democratic and widely popular, parliamentary governments are grossly defective political institutions and involve a breach of nearly every principle of sound government. The faults of parliamentary government are legion. In them, Prime Ministers are generally too powerful. Parties are too aristocratic. Parliamentary systems entail a fusion rather than a separation of powers. They utilize a compound executive. They suppress special interest groups. Finally, they have indeterminate electoral periods. We will review each of these flaws in detail.

Parliamentary systems, although there are many variants, are those in which elected representatives elect a prime minister, who forms a cabinet and through it conducts most of the state's affairs, until losing the majority support of the representatives, which then replace him with another prime minister who will form a new cabinet and govern likewise. The prime minister thus serves at the pleasure of the legislature, and may be dismissed at any time. It is thus necessary for him to secure and maintain the political confidence of the legislators, or some majority thereof, in order to maintain himself in office. Thus is he supposedly rendered responsible to the wishes of the people as expressed by their representatives. In parliamentary terminology, this is the principle of 'responsible government.'

Such responsibility is, however, mainly illusory. The inherent democratic nature of parliamentary systems is gravely compromised by the structural power of the prime minister and the incredible strength of most parliamentary political parties. In nearly all parliamentary systems, the prime minister is able to place a majority of representatives in a position where they must support him or lose their careers, and by so doing, he can defeat the democratic mechanism which would otherwise make him responsible to the representatives. This is done by creating or controlling a strong political party which can both reward supportive legislators with prestigious and lucrative positions in the cabinet and destroy the recalcitrant by stripping them of their party label in the next election, usually preventing their reelection. This is done by careful party control over nomination and candidacy procedures. After elimination, they can be replaced with more accommodative aspirants from the party rank and file, who will usually win election and support the prime minister as a quid-pro-quo for being granted the party nomination. Thus, the theoretical role of the legislature as a confidence chamber and watchdog over the prime minister is fictitious, for the prime minister will always have greater leverage over the legislature than it has over him. In most parliamentary systems, the principle of responsible government, of a prime minister and cabinet responsible to the representatives of the people, is turned on its head; the representatives serve at the pleasure of the prime minister, who becomes essentially an elected dictator until he loses control of the party or the people fail to elect his party to a majority of legislative seats.

Now, there are variations of electoral and party laws which weaken this power of the prime minister over the legislature, such as proportional representation election systems. Such systems return to the legislature an amount of candidates equal to the ratio of party votes cast in the election, such that if a party received only ten percent

of the vote, it would nevertheless receive ten percent of the seats in the legislature. A large number of legislative parties is the result, and a single party rarely commands a legislative majority all by itself. This is in marked contrast to plurality electoral systems, which return only the candidate with the most votes, denying representation to all other parties regardless of their level of inferior support. In plurality systems, the losing party with only ten percent of the vote gets no seats in the legislature. Thus, small parties are gradually exterminated as they merge into organizations large enough to command a plurality or majority of votes at election time. Since the small parties are eliminated under such systems, a single party is far more likely to have a majority in the legislature. It has, usually, only one rival party, and either it or the rival will have a majority. Under the proportional electoral system, there will by many parties in the legislature. When so many parties exist, it is not likely that a single party will achieve a majority in the legislature. More likely is that the largest party will seek out other parties to partner with and form a legislative coalition. This coalition will comprise a majority and elect a prime minister, which weakens the prime minister's power since he is less able to punish the coalition parties' members, for he does not directly control their nomination procedures, and he must be circumspect in his selection of cabinet ministers or risk losing the coalition's support. This renders him somewhat more responsible to the legislature, but it also has the unwelcome effect of rendering him grievously beholden to the smaller members of the coalition, which by definition hold relatively unpopular or even extremist views. Thus, the inherent democratic nature of parliamentary systems is gravely compromised by the immense power of the prime minister's position and the strength of political parties, both of which combine to thwart the representatives' power and produce a de-facto elective dictatorship.

In addition to grievously compromising the democratic element's political influence, parliamentary systems are unstable because they entail the fusion, not separation of powers—the ultimate political sin. Since the prime minister and cabinet are drawn from the legislature, often they exercise executive and legislative powers at the same time. We have seen the injustice which results from this unhappy coincidence already. Moreover, many parliamentary systems place the highest judicial authority not in a separate judicial branch, but in the legislature, or one of its chambers. In such cases, some legislators are judges, and the highest judges are always legislators, a political configuration which stinks in the nostrils of all people desirous of justice. In still more extreme and absurd configurations, a legislator who is a member of the cabinet, performing executive tasks relating to regulation of the courts, is also a judge capable of hearing cases. Thus, he is legislator, executive, and judge all at once! This is the grotesque stance of the Lord Chancellor of Great Britain, a nation whose government epitomizes the debauchment of the functional separation of powers.

The fusion of legislative and executive power in parliamentary systems results in another perverse result, namely that legislative power is almost entirely usurped by the executive. Since the legislature is dominated by the majority party, whose leader is prime minister, the legislature will effectively do only what the prime minister desires. His own legislative wishes will then be carried out by himself and his cabinet. He may write bills himself, and prevent any others from coming into being, in the case of his own party, or from coming to debate and consideration in the case of opposition parties. The former 'hoarding' of lawmaking by the cabinet enables it to do

more precisely what it wishes, while the latter ‘shelving’ of opposition bills is to the same purpose. Both can be easily done by a majority party, since this party is usually able to set the rules for parliamentary debate and can thus dictate the agenda and priority of all matters before the legislature. Most alarmingly, it can create rules adverse to the introduction of bills by the opposition. Of such rules, two types are of particular consequence. First, the majority party can drastically reduce the supply of legislative and committee staff, which retards the legislatures ability to investigate, analyze, draft, and consider new bills. Second, the majority party can vote into place parliamentary rules restricting the presentation of bills generally, such that each legislator can only introduce one, for example, or presentment privileges may be extended only to one legislator at a time according to a preset list of representatives, as in the case of Great Britain. Combined, these techniques result in a legislature that does not legislate, but rather merely elects a prime minister and cabinet, which in turn legislates instead, seeking the rubber stamp of the legislative majority as the last step. Thus, parliamentary systems ironically feature executives that legislate and legislatures that do not.

This attenuated legislative activity in parliamentary systems reduces the number and scope of special interest groups as well, for there is nothing to be gained by lobbying parliamentarians who lack the ability to introduce or meaningfully influence legislation. There is little to be gained by lobbying most members of parliament, whereas under a plurality system like that of the United States, no legislator is too insignificant to be lobbied, and the activities of special interest groups consequently flourish. In parliamentary systems, special interest groups are thus institutionally minimized and confined to activities related to lobbying the cabinet and the state bureaucracy.

Another shortcoming of parliamentary systems is that they feature a large, compound executive. The weakness of such an arrangement may readily be seen by reviewing the proper dimensions of the executive’s role in the constitution. The proper function of the executive is not to deliberate and make new law, but rather to execute and bring into being those laws already passed by the legislative branch. This duty is one which above all requires vigorous prosecution. Only the greatest despatch, born of efficiency and clarity of purpose, will bring those laws into being which the legislature has deemed necessary. Without such efficiency in the executive, the law-making power will be rendered impotent and nugatory. It will make no difference what laws the legislature passes, for none will ever come to bind the people or the state. It is to insure the efficiency of the executive that a single or unitary executive is to be preferred over a compound, group, or collective executive. Nor are the reasons for such preference in any way novel, for Hamilton summarized them with nicety in *the Federalist*:

Decision, activity secrecy and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counselors to him...Whenever two or more persons are en-

gaged in any common enterprise, or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring...Men often oppose a thing, merely because they have had no agency in planning it, or because it may have been planned by those they dislike. But if they have been consulted and have happened to disapprove, opposition then becomes, in their estimation, an indispensable duty of self-love. They seem to think themselves bound in honor...to defeat the success of what has been resolved...Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those whom they divide...[T]hey might impede or frustrate the most important measures of the government, in the most critical emergencies of the state. And what is still worse, they might split the community into the most violent and irreconcilable factions, adhering differently to the different individuals who compose the magistracy...But one of the weightiest objections to a plurality in the executive...is, that it tends to conceal faults and destroy responsibility...in such a manner as to make [it] obnoxious to legal punishment...It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall.²⁴⁸

These weaknesses of the compound executive fatally plague parliamentary governments. The prime minister, whether coequal or nominally superior to his cabinet colleagues, will inevitably be compromised and embarrassed in the execution of the laws. Moreover, as the executive is the natural seat of authority relating to matters of military command, the division of executive authority among several persons must be viewed from this context as well, where it is essentially a division of command.

Divisions of command are a recipe for military disaster. This is the timeless lesson of Cannae, where the Roman Consuls agreed to command the army opposing Hannibal on alternate days. One Consul was rash, the other cautious, and Hannibal was able to calculate with ease the correct day and place which would most completely compromise the entire Roman army, merely by choosing to offer battle on the most advantageous terrain on the day of the rash commander's authority. The result was the greatest military catastrophe to have ever befallen Rome. Later, the divided command of the Austrian and Russian forces allowed Napoleon to defeat them both, first in detail at Ulm and Vienna, and then together at Austerlitz. That same captain was able for the same reason to beat the Kingdom of Sardinia and Austrians in the Ligurian Alps and the upper Po river valley in 1796. In fact, throughout history, the divided command has been shown to be perhaps the ultimate strategic stupidity. Wherever it has worked, it has been by accident or sheer weight of resources. It is not our purpose here to conduct a survey of the history of warfare, but merely to note that the question of the compound executive must not be viewed in isolation from that of

²⁴⁸ Hamilton, *The Federalist on the New Constitution*, Number 70.

the divided military command, and to recognize that whatever the folly of the compound executive in civilian affairs, it is far worse in military matters.

A Further weakness of parliamentary systems is that they utilize indefinite electoral periods, not fixed cycles, for the election of the prime minister and his all-important cabinet. We have seen that the ideal election cycle is that which both provides enough time for the people to measure accurately the performance of elected officials while being short enough to remove them without irreparable harm being done. Moreover, we have seen that an ideal election cycle will be slightly longer than the average business cycle. Neither of these ideals can be reached if elections can be held at the pleasure of the legislature or the executive. Yet, in parliamentary systems, it is usually the case that the legislature may reelect or replace a prime minister any time they choose. The result of this is that the majority party's prime minister usually waits until his popularity is at its peak, and then calls for an election, which automatically returns him to office. This method is calculated to deceive the public, for it deprives them of the necessary interval during which they may accurately judge the performance of the prime minister or his partisans in the legislature, and it places the timing of elections in the hands of those who will exercise it when emotion and hype are at fever pitch, when the reasoned judgment of the people is most impaired by some stunning success or colossal pay-off in the form of new public funds or programs. The effect of this at-will election cycle is that the consent power of the people is largely defeated, their choice of candidates is impaired by emotionalism and a lack of information, and their ability to recall destructive officials is limited by the wishes of those very officials.

A pernicious side effect of this need to feed the electorate with extra spending and spectacle before an election is the sedimentary accumulation over the years of state programs, which eventually and naturally leads to a species of socialism, an economic arrangement whose political disutility we shall examine later. Thus, parliamentary systems tend to increase the role of the state, the level of taxes, and the extent of socialism, by the very structure of their at-will elections. In this sense, parliamentary democracy leads inevitably to socialism, or shades of socialism.

Yet another failing of parliamentary government is that it mandates highly aristocratic political parties. As we have seen, in order for a prime minister to be elected by the legislature and remain in their confidence so as not to be ejected at their leisure, he must of necessity control the legislature to the highest degree possible. The party which can accomplish this will invariably control the entire apparatus of government with no real check, balance, or active opposition. Thus, parliamentary systems put an enormous premium on inner-party control. If a party has a high degree of discipline, that is, if the party chiefs can reliably control the behavior of the rank and file office-holders, then the party will have sufficient discipline to either elect its own prime minister and cabinet when it attains a majority, or it will be able to participate effectively in a coalition government, pledging credible support to another party's candidates. It need not fear the private ambitions and interests of its own legislators. Proper coercion and inducements will guarantee their compliance with the wishes of the party chiefs. Such inducements may include cabinet positions, increased remuneration, coveted committee assignments and chairmanships, or assignment to prestigious posts and high-profile projects throughout the government. Threats may include forfeiture of all such perks and positions, as well as suspension of speaking rights in the legislature or even removal from party roster during the next election, resulting in the end of a legislator's career.

Without such discipline, a legislative party will be unable to compete in a parliamentary system. It will neither be able to elect a prime minister nor be an attractive coalition partner. Thus sidelined, its members will be perpetually relegated to the role of opposition, which in parliamentary legislatures, is a negligible function, for the lawmaking is monopolized by the majority party or coalition and mainly handled by the prime minister and his cabinet. Such a party will wither and die, for the more disciplined parties will invariably adopt portions of its agenda and cannibalize its support, being able to offer the party followers tangible legislative results as coalition members or majority government holders.

Thus, parliamentary systems create extraordinarily aristocratic parties, where a small clique or a single leader controls the entire party edifice. If parties are the main vehicle through which the people exercise their power of consent, such aristocratic parties effectively extinguish that consent power, and in doing so, they all but eliminate the democratic element of the constitution. This is because the consent power of the people becomes even further removed from the choice of candidates. The people consent to the rule of a party, without power or control over who the representatives will be or what principles will ultimately be observed by the party. All of the details are left to the few aristocrats in control of the party. Thus, democracy is suppressed and the rule of the few is raised in its stead.

Before leaving the topic of parliamentary systems, we must note that they introduce a terminological confusion which must be remedied. In parliamentary systems, the expression 'the government' does not refer to the entire entity of the state's governing structure, but merely to the executive part of it. This is confusing to those who rightly suppose 'the government' to mean the entire structure of political organization. When parliamentary systems report that the government has fallen and that a new government must be formed, they do not mean that a revolution has occurred and that a new constitution will be drafted, but rather that the executive has been displaced and a new executive will be duly chosen. The parliamentary connotation of 'government' must be avoided in general, for it introduces this kind of confusion. It deprives the English language of a convenient name for the total entity of the constitution or political structure, and provides a mere alias for what should simply be the executive power.

THAT BRITISH PARLIAMENTARY DEMOCRACY HAS ULTIMATELY BEEN A POLITICAL FAILURE

British parliamentary Democracy in its modern form was born in 1701, after the civil wars established Parliament as the supreme national power and the *Act of Settlement 1701* created a reasonably independent Judiciary. This Parliament at Westminster has often been called the mother of all Parliaments, as it has been adopted and enlarged upon by hundreds of nations around the globe. But from the date of its birth, it presided over an unceasing string of declines and failures, such that it has forfeited most of its territory and peoples, and retains only a fragment of its original size and power. An unbiased review of the facts reveals that every nation, state, colony, province or region subject to English power which could possibly escape did so at the earliest opportunity. Great Britain, with its England-dominated political system, has been totally unable to digest and assimilate diverse areas and peoples. It has failed to secure the allegiance of its various parts, be they members of its "empire", colonies, crown colonies, protectorates, mandates, or internal political

subdivisions. Early to exit were the American colonies, with a written, public indictment of the British colonial system called the *Declaration of Independence*. Over the course of the next two centuries, although Great Britain struggled mightily to establish new colonies and pursue new conquests, these merely added to the numbers of people and states either directly opposing, or desiring to run away from, British power. Her acquisitions never came to be internalized or integrated. They would never become content organic parts of the British system, for the British parliamentary system stymied acculturation and political adhesion. India, Australia, Canada, South Africa, Egypt, Iraq, Pakistan, Bangladesh, Hong Kong, Singapore, Sri Lanka, Ireland, Sudan, New Zealand, all abandoned Great Britain and its insufferable strain of Parliamentary Democracy. Even Great Britain itself is now dissolving, as it pursues the policy of 'devolution,' allowing Scotland and Wales their own semi-autonomous institutions. Thus, within three-hundred years, the British Parliamentary democracy has presided over the complete dismantling of British power.

Now, many will say that factors like war caused this decline, not constitutional inadequacy. We point out, however, that constitutional formats are the primary source of military success or defeat over the long-term. As Polybius said, "...the chief cause of success or the reverse in all matters is the form of a state's constitution; for springing from this, as from a fountain-head, all designs and plans of action not only originate, but reach their consummation."²⁴⁹ And we must always look back to the illustrious example of Rome, whose constitution was such that it maintained its confederate partners and conquests even in the face of ceaseless military catastrophe during Hannibal's campaigns. Rome's political integrity was so solid that a great portion of her allies and confederates remained loyal during the most grueling and destructive war to ever stain her soil. They remained loyal though they were physically occupied by the enemy, though their fields and peoples were burnt and massacred, though their treasuries drained, and though the Roman Armies often appeared powerless to protect them. This is in contrast to Great Britain, whose confederates and colonies in World Wars One and Two were ravaged nowhere nearly as badly as were Rome's, but who nevertheless refused to continue following Great Britain when peace returned.

The final verdict upon the efficacy of the British parliamentary system is that most everyone left it. An astounding statistic proves this. Dividing Britain's current size and population by that of the peoples and countries who have left it indicates that it has lost 99.4 % of its subjects and 97 % of its land.²⁵⁰ In other words, it retains only 3% of its land and a preposterous one-half of 1% of its people. This is a political system which has failed, whatever the merits of its interim achievements.

Respondent asserts that we have been hypocritical in our treatment of their long-time ally and former colonial masters, for earlier we held up Great Britain as a shining

²⁴⁹ Polybius, *Histories*, Book VI, Chapter XI (Polybius' Chapter V).

²⁵⁰ These figures are easily calculated by adding the populations or territories of all former members and subjects of the British power, and dividing this sum by the current British figures. The above figures are rough estimates calculated from the Economist Pocket World In Figures 1999 edition's lists of the 60 largest and most populous countries. Since these are modern figures, whereas the departure from British power may have been far older, these figures are more suggestive of what British power could have been, rather than what it actually lost, though it is ripe with implications regarding the latter.

example of mixed constitutional government, yet we now excoriate and denigrate the British system. These facts are correct, and we answer in passing that our praise of the British constitution extends to its attempt to employ mixtures of Aristocracy, Democracy, and Kingship. Our damnation proceeds from, among other things, its failures in that regard and its refusal to separate executive, legislative and judicial power. But Great Britain's failure as a political system is even more rooted in its inability to establish a workable Federation among its various parts and regions. We must remind Respondent that they came to the same conclusion themselves, and therefore cannot now be surprised or offended by our agreement with them. As Adams wrote nearly a year before Respondent declared independence from Great Britain:

...politicians may dispute forever, but they will never find any other moral principle or foundation of rule or obedience than the consent of governors and governed...England has 6,000,000 people...America has 3,000,000. England has 500 members in the House of Commons; [America has none.] America must have 250... Ireland, too, must be incorporated and send another hundred or two...Nay, further, [Great Britain] must have a House of Lords consisting of Irish, East and West Indian, African, American, as well as English and Scottish noblemen...for if America has 3,000,000 people and the whole dominions, 12,000,000, [America] ought to send a quarter part of all the members to the House of Commons; and instead of holding parliaments always at Westminster, the haughty members for Great Britain must humble themselves, one session in four, to cross the Atlantic, and hold the Parliament in America...[W]ithout such a union, a legislature which shall be sovereign and supreme in all cases whatsoever and coextensive with the empire *can never be established* upon the general principles of the English constitution...namely an equal mixture of monarchy, aristocracy, and democracy.

Britain has been imprudent enough to let colonies be planted until they are become numerous and important *without ever having wisdom enough to concert a plan for their government*...She has [now] come to find out that the great machine will not go any longer without a new wheel. She will make it herself. We think she is making it of such materials and workmanship as will tear the whole machine to pieces. We are willing...to assist [in making it]...But she says we will have no share in it; and if we will not let her patch it up as she pleases...she will tear it to pieces herself by cutting our throats...therefore she will resort to war and conquest...To this kind of reasoning, we can only answer that we will not stand to be butchered.²⁵¹

It is this myopic method of government, fully in disparagement of the ideals of the federal harmonic constitution, especially regarding the consent of the democratic element, that ultimately doomed the British parliamentary system. Respondent objects that our censure of the British system is scandalous, as the venerable British govern-

²⁵¹ Adams, letter under pseudonym Novangus, *Massachusetts Gazette*, February 6, 1775, quoted above from *The Annals Of America*, Vol. II, Selection VXX. (italics supplied; sentences repositioned.)

ment was a model for its times, and should be understood in light of those times, wherein few systems were as good and few nations as accomplished. We have also received an amicus brief from the Respondent's ally herself reiterating this. We again remind the Respondent, and ally, that at the time of the Declaration of American Independence, the policies of Great Britain were decried by Respondent as idiotic. Respondent never considered the British government a model for its time, rather Respondent pungently lampooned the stupidity of British parliamentary democracy, particularly as related to its anti-democratic colonial policies. None did so more succinctly than Franklin, who wrote the brilliant and incisive irony *Rules Whereby A Great Empire May Be Reduced To A Small One*, summarizing the policies of British colonial rule, from which we excerpt as follows:

An ancient sage valued himself upon this, that though he could not fiddle, he knew how to make a great city of a little one. The science that I...am about to communicate is the very reverse. I address myself to all ministers who have the management of extensive dominions, which from their very greatness are become troublesome to govern, because the multiplicity of their affairs leaves no time for fiddling.

1. In the first place...a great empire, like a great cake, is most easily diminished at the edges. Turn your attention, therefore, first to your remotest provinces; that as you get rid of them, the next may follow in order.
2. That the possibility of this separation may always exist, take special care the provinces are never incorporated with the mother country; that they do not enjoy the same common rights, the same privileges in commerce; and that they are governed by severer laws, all of your enacting without allowing them any share in the choice of the legislators. By carefully making and preserving such distinctions you will (to keep to my simile of the cake) act like wise gingerbread baker, who to facilitate a division, cuts his dough half through in those places where, when baked, he would have it broken to pieces.
3. Those remote provinces have perhaps been acquired, purchased, or conquered at the sole expense of the settlers...If this should happen to increase [your] strength...commerce...or naval power...you are therefore to resent it, as if they had done you some injury. If they happen to be...lovers of liberty...remember all that to their prejudice, and resolve to punish it...
4. However peaceably your colonies have submitted to your government...suppose them always inclined to revolt, and treat them accordingly. Quarter troops among them who by their insolence...provoke the rising of mobs, and [then] by their bullets and bayonets [you may] suppress them...By this means, you may convert your suspicions into realities.
5. Remote provinces must have governors and judges...If you send them wise and good men for governors...they will

think their king wise and good...This may attach your provinces more [firmly.] You are therefore to...find prodigals who have ruined their fortunes, broken gamesters, or stock-jobbers...for they will probably be rapacious, and provoke the people by their extortions. If withal they should be ignorant, wrongheaded, and insolent, so much the better...and all will contribute to impress those ideas of your government that are proper for a people you would wish to renounce it.

6. To confirm these impressions and strike them deeper, whenever the injured come to the capital with complaints of mal-administration, oppression, or injustice, punish such suitors with long delay, enormous expense, and a final judgment in favor of the oppressor. This will have an admirable effect in every way. The trouble of future complaints will be prevented, and governors and judges will be encouraged to further acts of oppression and injustice; and thence the people may become more disaffected, and at length, desperate.

7. When such governors have...made themselves so odious to the people that they can no longer remain among them with safety...recall and reward them with pensions...All will contribute to encourage new governors in the same practice, and make the supreme government detestable.

8. ...They will probably complain that they are taxed by a body in which they have no representative, and that this is contrary to common right. They will petition for redress. Let the parliaments flout their claims, reject their petitions, refuse even to suffer the reading of them, and treat the petitioners with the utmost contempt. Nothing can have a better effect in producing the alienation proposed...

9. In laying these taxes, never regard the heavy burdens those remote peoples undergo in...making new roads...and other public edifices, which in old countries have been [given] you by your ancestors...all this you are entirely to forget. But remember to make your arbitrary tax more grievous to your provinces by public declarations importing that your power of taxing them has no limits...This will probably weaken every ideal of security in their property...which can scarcely fail of producing the happiest consequences!

10. Possibly, indeed, some may still comfort themselves and say, "though we have no property, we have yet something left that is valuable; we have constitutional liberty, both of person and of conscience. This King...cannot take from us our habeas corpus right, or our right of trial by a jury...they cannot deprive us of the exercise of our religion..." To annihilate this comfort, begin by laws to perplex

their commerce with infinite regulations, impossible to be remembered and observed; ordain seizures of property for every failure; take away the trial of such...by jury and give it to arbitrary judges...of the lowest character, whose salaries...arise out of the duties and condemnations...[A]nd pass an act that those there charged with certain other offenses shall be sent away in chains...to the [distant] metropolis of the empire...and tried in the same manner for felony...and to be ruined by the expense if they bring over evidences to prove their innocence, or be found guilty and hanged, if they cannot afford it. And...pass another act, "that King...[has the] full power and authority to make statutes...in all cases whatsoever." This will include spiritual with temporal, and, taken together, will wonderfully...convince them that they are...under a power...which can not only kill their bodies, but damn their soul to all eternity, by compelling them, if it pleases, to worship the devil.

11. To make your taxes more odious...send [the most insolent] officers [you can find]...to superintend the collection. Let these have large salaries out of the extorted revenue, and live in open, grating luxury...Let these men...be exempted from all the common taxes...If any revenue officers are suspected of the least tenderness for the people, discard them.

12. Another way to make your tax odious is to misapply the produce of it...Bestow it where it is not necessary, in augmented salaries...to the very governor who has [earned the] enmity of the people...This will make them pay it more unwillingly, and...[make] them weary of your government.

13. If the people...[financially] support their own governors...[these] may be thereby influenced to treat the people kindly...[forbid this, so] the people may no longer hope any kindness from their governors...

14. If...your provinces should dare to claim rights...order [their assemblies] to be harassed with repeated dissolutions...

15. Convert the brave, honest officers of your Navy in to pimping tide-waiters and colony officers of the customs. Stop and detain every coaster...every fisherman...tumble their cargoes and even their ballast inside out and upside down; and, if a pennyworth of pins is found un-entered, let the whole be seized and confiscated. Thus shall the trade of your colonists suffer more from their friends in time of peace than it did from their enemies in war...

16. If you are told of discontents in your colonies, never believe that they are general...Redress no grievance, lest they should...demand the redress of some other grievance. Grant no request that is just and reasonable, lest they should make another that is unreasonable...Catch and hang a few

[demagogues and discontents] and the blood of the martyrs will work miracles in favor of your purpose.

17. If you see rival nations rejoicing at the prospect of your disunion...let not that alarm or offend you. Why should it, since you [both wish] the same thing?

18. If any colony should...erect a fortress...turn it into a citadel to awe the inhabitants and curb their commerce...

19. Send armies into their country under pretense of protecting the inhabitants; but...order the troops into the heart of the country, that the savages may be encouraged to attack the frontiers...

20. Lastly, invest the general of your army...with great and unconstitutional powers, and free him from the control of even your own civil governors...(like some provincial generals in the Roman Empire...) If you have carefully practiced these few excellent rules of mine, take my word for it, all the provinces will immediately [desert you] and you will that day, (if you have not done it sooner) get rid of the trouble of governing them...²⁵²

Franklin's satire illustrates to our complete satisfaction the utter imbecility of the British parliamentary system, and further shows that Respondent never considered the British government a model for its time, rather Respondent detested and deserted that system, as did everyone who ever tasted it. Insufferable as British rule was in America, we can only imagine how bad it must have been for the myriad peoples elsewhere under that yoke. We therefore overrule Respondent's objections regarding our disparagement of their ally and former colonial master.

Respondent again objects that our quotations in general, and especially of Franklin, are often attenuated and rearranged so as to overstate points beyond the intent of the authors. We have only done so when the interests of clarity and concision have demanded it. If this has perchance accentuated the articulation of justice and cast the Respondent in a discreditable light, we are not disturbed, nor has any injustice been done. Moreover, this is no impediment to the industrious who chose to read the originals, only a penalty to the lazy, which we consider not a penalty at all but rather a favor. We therefore disregard this objection.

For the preceding reasons, we hold that that British parliamentary democracy has been a failure, a fact which we mention in order to illustrate our larger point that parliamentary systems are inherently unjust as they debauch the principles of separated powers and consent of the governed. British parliamentary Democracy has, from the date of its birth, been totally unable to digest and assimilate large, diverse areas and peoples. Her acquisitions never came to be internalized or integrated as organic parts of the British system. Thus, within three-hundred years, the British Parliamentary democracy almost totally disintegrated, a fact which illustrates the general weakness of parliamentary systems and their disparagement of the harmonic constitution. Our

²⁵² Franklin, *Rules By Which A Great Empire May Be Reduced To A Small One*, London Public Advertiser, 1773. Excerpted from *The Annals of America*, Vol. II, Selection 49.

criticisms of British parliamentary Democracy should become even clearer as our discussion of ideal constitutions turns to the topic of Federations and vertical separations of powers.

THAT THERE NEVER WAS A BRITISH EMPIRE PROPERLY SPEAKING

Respondent's ally Great Britain has moved to join this case in an effort to defend itself against our holdings regarding its alleged imperial failures. Although we decline to allow joinder for such a collateral issue, we are sympathetic to their desire to present facts which Respondent may have failed to adduce. In amicus brief, Britain argues that after the American revolution, it never sought to retain or dominate its imperial possessions, but rather maintained a consistent policy of setting them free with complete, independent sovereignty as soon as each was capable of even rudimentary home rule. Britain points out that it assisted and encouraged the formation of Canada, Australia, and New Zealand and South Africa as independent sovereign nations, with no mutual bonds or ties save those of friendship and common interest. Moreover, this was done at a time when Great Britain was the leading power of the world and certainly strong enough to keep them or contest their departure had it so desired.

Britain concedes that in creating these states it reserved some prerogatives to itself, especially relating to foreign policy and international trade, but emphasizes that such were nominal and as a practical matter unenforceable; hence they fell quickly into desuetude and disappeared. Britain also adds that these reservations were not contained in the new constitutions of the states it created, which granted full autonomy in defense and foreign matters.

Britain argues that from the nineteenth century onward, it strove to extend home rule and autonomy to all areas under its control as soon as practicable, and that where such did not occur, there supervened conditions which retarded the effort. In India, for example, unique problems of religious, racial and sectional strife prevented a timely extension of home-rule. As a result, that state indeed tore itself away from Great Britain in haste before home rule could be eventually established according to the patterns which occurred in other commonwealth nations. However, this was the exception not the rule.

This, asserts Britain, describes the creation of the *commonwealth of nations*, a club of independent sovereignties with equal status, in no way subordinate to one another, in any aspect of their domestic or external affairs, though united by a common allegiance to the crown and freely associated as members of the British commonwealth of nations.²⁵³ Britain emphasizes that although it calls this an 'Empire,' it is was certainly not an empire in the literal sense, but rather a family of independent nations related by blood, sentiment, and self interest. It was an informal

²⁵³ Closely paraphrasing the Balfour definition of commonwealth status as stated at the Imperial Conference of 1926. Summary of Proceedings, *Parliamentary Papers* 1926, XI [CMD.2768], p. 14.

league, and references to Empire are poetic expressions only, wholly void of any political reality.

We are grateful for Britain's clarifications in this regard. We are willing to revise our remarks regarding the failure of British parliamentary democracy in light of these new arguments. It would seem that Britain dismantled its own empire of its own choice and created instead a loosely associated coalition of the nations which it fathered. We cannot claim that Great Britain failed to accomplish that which it in fact never set out to do. Accordingly, we cannot claim that they failed to maintain their empire. We will restrict our censure of British parliamentary democracy to this: it failed internally to honor the functional separation of powers, and externally, to desire any integration with its dependencies when they were such, or implement any substantial integration with them when it set them free as loose members of its commonwealth of nations. We can only regard the British Commonwealth as a group of nations associated more or less closely as their individual economic and military interests dictated. Above this, sentimentality and cultural affinity creates an aura of greater integration among them which is not, nor was ever, borne out in any political institution. Thus, in reality, there hardly ever was such thing as a British Empire in the true sense of empire or *imperium*. Empire is the non-consensual and absolute authority, or *imperium*, which one state establishes over another without mutually integrating with the legislative element of that servient state. Great Britain embarked on economic ventures which accidentally resulted in proprietary social establishments abroad, over which it exercised an imperium. The original settlements were corporations, and though this court is keenly aware that economics and politics are the same thing, such was unknown to the British, who allowed the companies to grow into colonies without any clear idea of how to govern them or integrate with them once their political character and independence became manifest. The American and Indian colonies departed forcibly, but Britain extended independence to the remainder freely, creating commonwealth nations, in hopes that the primarily economic advantages of the colonial relationships would continue indefinitely despite the independent status.

Great Britain's power grew from an early and temporary monopoly of industrialization, and was supported by resources drawn from colonies abroad. These possessions were considered primarily economic rather than political accessions to Great Britain. They were therefore not incorporated into the regular constitutional fabric of British parliamentary democracy. When they became powerful in their own right, they cast off British rule, forcibly in the cases of India and America, and with British blessings in most others. Their association from thence forward was based on the desirability of British financial assistance and military protection. The vast wealth Britain accumulated during her brief monopoly of industrial power and from colonial trade was, however, largely spent on military action and reconstruction during World Wars One and Two. After these expensive contests, Great Britain could offer no serious military protection to the commonwealth nations, nor supply them with meaningful financial aid. It was Great Britain, rather, that stood in need of military and financial support. It stood nearly bankrupt by war and its industries were no longer monopolists in the industrial world. It therefore retained no economic or military levers of control over its commonwealth, and the British 'Empire' evaporated.

The disintegration of British power was a failure insofar as nations should be constructed with expansion in mind, and that political division should be eschewed

when political integration is possible along lines resembling the harmonic constitution. Great Britain had an opportunity to create a vast global federal republic. It began with an enlightened concept of the mixed constitution. It later had before it the example of separated powers in the United States. It understood and applauded the pursuit of federalism in Australia and Canada. Yet, it adopted none of these devices itself. It made no attempt to integrate politically, especially legislatively, with the areas it colonized and the societies it thereby fostered. In the case of America, it briefly attempted imperialism. With India, such was continued out of force of circumstances. Elsewhere, Britain relinquished political control piecemeal with the purblind expectation that it would be able to retain political and military allegiance with the departed territories indefinitely. The result was eventual weakness and marginalization as a nation. Besides its debauchment the separation of powers, this is the failure of which we speak when we deprecate British parliamentary democracy.

SECTION III: FEDERALISM AND THE SPATIAL SEPARATION OF POWERS

THAT POWER MAY BE SEPARATED SPATIALLY, ALONG HARMONIC CONSTITUTIONAL LINES, A TECHNIQUE CALLED FEDERALISM.

We have thus far combined two theories of separated powers, one concerning who rules, the other, how they rule. This amalgamation gave us the harmonic constitution. But the notion of separated powers cannot stop there. Power must also be separated spatially, a technique called federalism. This third type of separation of powers we will now add to the previous two. It concerns 'where' governments rule. This is a separation by geographic hierarchy. A geographic separation of powers assigns certain regions to the authority of certain groups. A hierarchical separation of power assigns priority of rule among entities. When combined with the harmonic separation of powers, a geographic/hierarchic separation of powers simply assigns harmonic governments to specific lands for specific matters.

Just like the other separations of powers, federalism is a three-part system. As we saw before, each separation of powers is composed of three possibilities. Legislative-executive-judicial, in the case of the functional separation of powers, or democratic-aristocratic-monarchic, in the per-capita separation. The federal separation of powers likewise has three, and only three, possibilities. Power can be separated spatially along either the X, Y, or Z axis of the three-dimensional or 'Cartesian' grid. There are no other spatial possibilities. Federalism addresses the question of 'where they rule.' 'Where' is a question of spatial dimensions, of which there are only three. Adding time as a fourth dimension is merely to add the word 'history' to all this. So, although we mention geography and hierarchy independently, as if they were different things, they are really part of the same X-Y-Z grid system of governmental spatiality. Geographic separations are along the X and Y axis, and hierarchic distinctions implicate the Z axis.

Federalism is this division of power by both geography and hierarchy. If there is no hierarchy but only geographic separation of governments, a pure democracy of neighbor states emerges. If each have power over the others, then a hierarchy is added and a federal system results. However, the natural way of things is that stronger states always intimidate the weaker, without significant mutual influence. This hierarchy is unavoidable and eventually undoes the democratic spatial separation, as one state takes over the others, restoring things finally to unity. An international variant of the constitutional cascade results. To prevent this, to insure the spatial separation survives such competition, it must be imbued with checks and balances. Therefore, the geographical assignment must be done according to the mixed constitutional method, namely assigning one state authority in some respect, some of the states authority in others, and all states authority in still other respects. If this is done, the group becomes a federation.

A federation is a cooperative relationship among sovereign states. When loosely structured, it resembles an alliance. When elaborate, it appears as a single nation. In the *Federalist*, Hamilton described it thus:

The definition of a *confederate republic* seems simply to be "an assemblage of societies," or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy.²⁵⁴

Freeman, in his unrivalled *History of Federal Government*, goes into slightly more detail, beginning with the observation that there are a wide variety of arrangements which can be considered somewhat federal, in that they conform in some way to the federal ideal, and that this ideal is simply institutionalized compound government:

Federal Government is...in its essence, a compromise between two opposite political systems. Its different forms occupy the whole middle space between [them]. It is therefore only natural that some of these intermediate forms should shade off imperceptibly into the extremes on either side. Controversies may thus easily be raised both as to the correct definition of a Federal Government, and also whether this or that particular government comes within the definition...The name of Federal Government may, in this wider sense, be applied to any union of component members, where the degree of union between the members surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of merely municipal freedom...

...Two requisites seem necessary to constitute a Federal Government in...its most perfect form. On the one hand, each of the members of the Union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern, the whole body of members collectively. Thus each member will fix for itself the laws of its criminal jurisprudence, and even the details of its political constitution. And it will do this, not as a matter of privilege or concession from any higher power, but as a matter of absolute right, by virtue of its inherent powers as an independent commonwealth. But in all matters which concern the general body, the sovereignty of the several members will cease. Each member is perfectly independent within its own sphere; but there is another sphere in which its independence, or rather its separate existence, vanishes. It is invested with every right of sovereignty on one class of subjects, but there

²⁵⁴ Hamilton, *The Federalist On The New Constitution*, Number IX.

is another class of subjects on which it is as incapable of separate political action as any province or city of a monarchy or of an indivisible republic. The making of peace and war, the sending and receiving of ambassadors, generally all that comes within the department of international law, will be reserved wholly to the central power. Indeed, the very existence of the several members of the Union will be diplomatically unknown to foreign nations, which will never be called upon to deal with any power except the Central Government. A Federal Union, in short, will form one state in relation to other powers, but many states as regards its internal administration.²⁵⁵

...We may then recognize as a true and perfect Federal Commonwealth any collection of states in which it is equally unlawful for the Central Power to interfere with the purely internal legislation of the several members, and for the several members to enter into any diplomatic relations with other powers. Where the first condition is not obtained, the several members are not sovereign; their independence, however extensive in practice, is a merely municipal independence. Where the second condition is not obtained, the union, however ancient and intimate, is that of a mere [alliance] rather than that of a real confederation.²⁵⁶

Thus we can appreciate both the ideal of federal government, and the fact that actual instances of federal government will vary between the centralized or localized extremes. This variance has produced a nomenclature of its own. Confederacy has gradually come to connote a weak central authority with strong members, while federation implies a strong central government with weak members. Thus, one can imagine a continuum between monolithic statehood and loose confederation, wherein lie federations of all ratios of power between the central and member governments. At one extreme there is a powerful central government with politically irrelevant members, and at the other there are strongly independent members weakly related as a league of allies. Configurations featuring relatively strong central power are generally called federations, and those with weak central power, confederacies.

Federation can occur two ways; a big state can subdivide, or small states can come together. A state can federate either by divesting itself of some power and forming therewith independent subsidiary governments, or by entering a federal compact with other pre-existing states, each donating some power to a newly created central government and becoming partially subject thereto. A harmonic constitution's adoption of federalism provides the strongest and most just structure possible.

Federations usually result from the establishment by several separate states of a central authority for limited purposes, residuary functions being retained by the several participating states. The central authority then acts on behalf of the component

²⁵⁵ Freeman, *A History of Federal Government: From the Foundation of the Achaean League to the Disruption of the United States*, Vol. I, General Introduction—*History of the Greek Federations*. Chapter 1, Subchapters 2-4.

²⁵⁶ Freeman, *A History of Federal Government: From the Foundation of the Achaean League to the Disruption of the United States*, Vol. I, General Introduction—*History of the Greek Federations*. Chapter 2, Subchapters 1 & 2.

states in the matters entrusted to it. But a confederacy must have some central authority, for if this does not exist the entity is not a confederacy but merely an alliance or a treaty. Thus, confederacies are states united in pursuit of some mutual object of welfare or security, which feature a central authority with some share of power over members who retain the residuary power.

As we describe the federal separation of powers in greater detail, it will become clear that the most just constitution is still tripartite in a sense. It is not, however, a three-part blend of democracy, aristocracy and monarchy, as the ancients supposed. Nor is it a triple blend of legislative, executive and judicial power. Rather it is a triple mixture of both of these plus a federal separation of powers. The ideal constitution is a triple separation of powers, a federal harmonic constitution.

THAT FEDERATION IS MERELY A PROGRESSIVE DOUBLING OF THE HARMONIC MEAN

We have discussed how the elements of who rules and how are balanced by the harmonic mean. We called this the harmonic constitution. But Federation, or the question of 'where' governments rule, is also part of the harmonic constitution, being a doubling thereof. In the harmonic constitution, the class divisions were the functional divisions flipped around and doubled. Likewise, the federal division is the class divisions flipped around and doubled again, utilizing the same harmonic ratio as before.

Federal power is ideally balanced by the equal aggregate power of the members. Every member's power is equal to its harmonic constitution, so the Federal power must equal the sum of all members' harmonic constitutions. The harmonic mean generates exactly this relationship. Imagine two harmonic states which desire to federate. The first has the harmonic constitution $A^{***}B^{*}C^{**}D$, where $A-B$ is the democratic element, $B-C$ is the monarchic, $C-D$ is the aristocratic, and $B-D$ is the government, composed of $B-C$, the executive power, and $C-D$, half of which is the judicial and half the legislative power. This is the harmonic constitution described earlier. Now imagine an identically structured second state wishing to federate with the first. Let its identical divisions be named $Z^{***}Y^{*}X^{**}W$. Note that its proportions are identical to the other state. They are both harmonic constitutions. The functions, $B-C-D$, were flipped around and doubled to derive the classes, $D-C-A$. Federation is merely doing this again, flipping around and doubling the $D-C-A$. The result is $A-C-E$, and the line looks thus: $A^{***}B^{*}C^{**}D^{*****}E$. $A-D$ is member power, and $D-E$ is federal power, exactly balanced. This is merely the harmonic mean's next increment. Federalism is represented by the third magnitude of the harmonic mean. But recall that the state $Z^{***}Y^{*}X^{**}W$ will join the federation. It also flips and doubles, yielding $Z^{***}Y^{*}X^{**}W^{*****}V$. The increment $W-V$ is added to the federal power, and its original constitution, $Z^{***}Y^{*}X^{**}W$, is added to the members' power. The new federation now has two members, and member power equals federal power. Member power is lines $A-D + Z-W$. Federal power is $D-E + W-V$. The balance of power between the members and the federal government is equal: 12:12. Any new member of the federation does likewise. It flips, doubles, and the harmonic result is the accretion of power due to both the members and the central government. Balance is maintained.

This resulting federal power, of course, must be harmonically decomposed in order to identify its harmonic elements, namely the executive, legislative, judicial, aristocratic, monarchic, and democratic powers which obtain at the federal level. Since it is divisible by six, this is easy. It will always be reducible into the harmonic mean, FA***FB*FC**FD, where F denotes the federal instance of the harmonic element.

THAT FEDERATION OCCURS NATURALLY AMONG NATIONS WHEN THEIR SELF-SUFFICIENCY IS ENDANGERED OR LOST

Aristotle described the natural development of states, positing that the mature state represented the ultimate stage of a natural progression of human associations, starting with the nuclear family, and ending in the self sufficient state.²⁵⁷ He noted that pairs of individuals are naturally drawn together by necessity to form a family, without which neither can survive nor procreate, and whereby each gain their daily needs.²⁵⁸ Around these nuclei form households of children and grandchildren, and in turn myriad households draw together in order to secure those needs which remain wanting, thus naturally and inescapably forming the village. These villages, lacking yet a sufficient means of self-defense and economic plenty, naturally come together into larger and larger associations until together they finally attain complete self-sufficiency.²⁵⁹ Aristotle concludes that all states arise in this fashion naturally and embody the final success of the *individual's* original goal, namely, self-sufficiency. "From these things, therefore, it is clear that the state is a natural growth and that man is by nature a political animal."²⁶⁰

The birth of the Federation also occurs naturally, when the self-sufficiency of *states* becomes for some reason insecure. Under such circumstances, states may do three things: they may merge, as did Rome with the Sabines, or they may undertake to regain self-sufficiency through conquest, or they may join together for the limited purpose of supplying specific mutual insufficiencies. It is this last association that usually produces a central authority which represents the group in delegated matters. This is a federation.

²⁵⁷ Aristotle, *Politics*, Book I, Chapter I, at 1252a30.

²⁵⁸ However, as we saw in The Sophomoric Discourses, here we should merely say, 'to survive,' and omit explicit reference to procreation, for survival includes one's posthumous effects, including children and accomplishments. See Book III, Chapter XVIII.

²⁵⁹ These two state-inducing causes are not stipulated by Aristotle; they are our contentions here. Aristotle states only that villages naturally draw together into states.

²⁶⁰ Aristotle, *Politics*, Book I, Chapter I, at 1252a5.

THAT FEDERATIONS MOVE BETWEEN TWO CONDITIONS, HEALTH AND CORRUPTION.

There are two fundamental conditions of a federation: health and corruption. Federations which protect willing members from collateral and outside threats are healthy, whereas a federation which merely protects members from itself is corrupt. This distinction mirrors the pure constitutions and their corrupt counterparts. Corruption usually occurs when confederations acquire and retain members by economic and militarily coercion. A recent example of a corrupt confederation was the Union of Soviet Socialist Republics, maintained by brutal Russian enforcement.²⁶¹ An ancient example was Athens' Delian League, which began as a healthy federation aimed at thwarting the Persian menace but at length devolved into an Athenian empire maintained by military bullying.²⁶²

The Delian League was born to prevent recurrence of the Persian invasions of Greece in 480 and 490 B.C. These invasions had been repulsed chiefly by Athens, which had thereby shown itself to be, with Sparta, one of the two leading Greek powers. The defeat freed the communities in the Aegean and western Asia Minor from Persian domination, and they promptly sought to safeguard their freedom by forming a permanent Greek federation. Sparta attempted to organize it, but the insolence of the Spartan Pausanias, who undertook the effort, was so offensive that Athens was invited to organize the confederacy instead. Therefore, under the influence and guidance of the Athenian Aristides:

It was agreed that the Greeks of Asia and the islands should form a league whose interests would be discussed by a general assembly; that Athens should have the direction of military operations, each city retaining complete independence as to its interior government, and furnishing to the common cause men, vessels, and money, according to a schedule approved by the assembly...

In order to prepare it with perfect equity, Aristides visited all the cities, on the islands as well as on the mainland, and investigated the strength and the resources of each....Athens...made the sacred island [of Delos] the center of the Hellenic confederation. At the festival of Apollo the deputies assembled; in the treasure of his temple the common contribution was deposited. Aristides was elected guardian of this treasure, and administered his office with such probity that after his death the allies would have none but an Athenian in his place.²⁶³

Thus the Delian League was formed. At its height, it comprised over two-hundred members, who enjoyed the mutual benefits of Athenian-led defense and a

²⁶¹ It could be argued that this, and its alliance, the Warsaw Pact, were not truly federal at all.

²⁶² Thucydides, *The Peloponnesian War*, Book VIII, 1-5. For the debate between the relative merits of pure or perverse federation, see Book III, 37-49.

²⁶³ Duruy, *History Of Greece, From The Earliest Times To The Roman Conquest*, Volume II, Section II, Chapter XVIII, Subchapter I.

hugely increased foreign commerce. Most members paid monetary dues in lieu of military contributions, roughly based on their relative means. This freed them to pursue commerce but greatly diminished their ability to remain independent from Athens. A few members continued to furnish ships and arms, thereby remaining privileged members of the league. These massive contributions were collected by Athens, which transformed them first into an unrivaled fleet, and later into glorious temples and public buildings on the Acropolis. Athens' power was amplified many fold. Athens dominated the league council by the weight of its votes combined with those of a very few additional members which sufficed for a majority. Shortly, the league ceased to be one of equals and became rather an Athenian instrument of immense strength. The Athenians soon transferred the treasury from Delos to Athens, and imposed on the allies the use of Athenian currency and a mercantile law administered in Athens by Athenian courts.²⁶⁴ At length, they also disbanded the interlocutory congress of league members at Delos. Nevertheless, the allied cities kept their own internal laws and constitutions, even where, as in Samos, Chios, and Lesbos, these were undemocratic. Only during the Peloponnesian war did Athens refuse to tolerate anti-democratic constitutions among the members. League members even kept the right of making war separately.²⁶⁵

Seven years after the formation of the league, the island of Naxos attempted to withdraw. The Athenian navy prevented the secession and forced them to continue their membership. Thus began the slow transformation of the league from purity to corruption. A voluntary membership was gradually becoming compulsory. Nevertheless, most members were still willing participants, and when the Peloponnesian War broke out between Athens and Sparta, and spread to their respective allies, the Athenians were able to boast with only slight exaggeration that their confederacy was relatively pure. At the famous funeral oration, the Athenian Pericles said:

I should like to point out by what principles of action we rose to power, and under what institutions and through what manner of life our empire became great...We make our friends by conferring, not receiving favors...We alone do good to our neighbors not upon a calculation of interest, but in the confidence of freedom...²⁶⁶

These were winged words, but after sixteen years of bitter war, Athens had abandoned such philanthropic sentiments and adopted a more cold-blooded method of securing Delian league members. When Athens decided to force the island of Melos to join her confederacy, she bluntly told the Melians:

...We have come in the interests of our empire...The powerful exact what they can, and the weak grant what they must...We want to make

²⁶⁴ Actually, the second most powerful league member, Samos, proposed moving the treasury to Athens, to safeguard it from the Peloponnesians, but Athenian complicity in the move is hard to doubt. See Duruy, *History Of Greece, From The Earliest Times To The Roman Conquest*, Volume II, Section II, Chapter XIX, Subchapter II.

²⁶⁵ Duruy, *History Of Greece, From The Earliest Times To The Roman Conquest*, Volume II, Section II, Chapter XIX, Subchapter II.

²⁶⁶ Thucydides, *The Peloponnesian War*, Book II, Sections 33-40.

you ours with the least trouble to ourselves, and it is for the interests of us both that you should not be destroyed...Your subjection will give us an increase of security, as well as an extension of empire. For we are masters of the sea, and you who are islanders, and insignificant islanders too, must not be allowed to escape us...To you the gain will be that by submission you will avert destruction; and we shall be all the richer for your preservation...Your enmity is not half so mischievous to us as your friendship; for the one is in the eyes of our subjects an argument of our power, the other of our weakness... the real danger [to us at this juncture is not our enemy the Spartans, but] our many subject states, who may of their own motion rise up and overcome [us,] their masters. But this is a danger which you may leave to us...We have come in the interests of our empire, and...we are only seeking the preservation of your city.²⁶⁷

Milos voted to remain independent, was attacked, and summarily destroyed. The male citizens were slain, the women and children sold into slavery. The city was then repopulated with colonists and enrolled in the Delian League. Thus did Athens' Delian League drift from a pure to a perverted form. The Delian league had become simply an Athenian empire. There was no longer anything voluntary about it.

It can be argued that the United States originated upon the pure federal principle but, when confronted with the fact of southern secession, fell into corruption, as it demanded that the seceded states rejoin or perish.²⁶⁸ We are not interested in analyzing this thesis here, as we are merely illustrating the idea that the motive for membership distinguishes pure from corrupt federations, and the Delian League sufficiently illustrates this.

THAT FEDERATIONS ARISE PRIMARILY IN RESPONSE TO MILITARY THREAT AND FRAGMENT WHEN IT DISSIPATES.

There are two causes which impel states to confederate: physical insecurity and economic want. Since the latter always causes the former, we can conclude that federations principally arise to augment self-defense. Our observation regarding America's foundation and its subsequent civil war exemplifies this principle. The experience of military suppression ultimately impelled the colonies to confederate. When this danger receded over the ensuing decades, the member states regained a degree of self-sufficiency, whereafter the federation was no longer cemented by the original and natural basis for its existence. Under such circumstances, the southern States viewed themselves as self-sufficient and capable of forming a smaller confederacy, one more perfectly dedicated to a slave-based economic and political order. By themselves, the Confederate States of America were not only self-sufficient; they mounted a tremendous military challenge to the remaining United States. Together, the American Revolution and the Confederate secession exemplify how federations

²⁶⁷ Thucydides, *The Peloponnesian War*, Book V, Sections 86-98.

²⁶⁸ The counter argument, towards which we are well disposed, is that the slave states were oligarchies as to their black populations and cannot defend their actions upon 'consent of the governed' principals.

form during eras of insufficiency and dissolve again when the individual members regain their self-sufficiency.

Respondent claims that the European Union arose as an economic arrangement and thus disproves our contention that Federations arise from military threat. We remind Respondent, however, that the Treaty of Rome grew out of a Pan-European iron, steel, and coal authority, which was created to restrain Germany's war-making capabilities. Most of the iron and coal in Europe is found within Germany, particularly the Ruhr valley. The iron and coal authority permitted Germany's western neighbors to participate in control over these vital strategic resources. Thus, Respondent is incorrect in citing an economic origin of the European Union. It arose in response to the threat of a resurgent German military machine and also the threat of militant communism.

THAT FEDERATION AUTOMATICALLY REDUCES MILITARY DANGER TO ITS MEMBERS, ESPECIALLY IF THEY ARE CONTIGUOUS.

Federations improve member security because they nearly always reduce a military threat. This is not simply because many states are stronger than one, but because groups of contiguous states are even more so. This is clear from the geometric law that a larger area yields a smaller relative circumference. The contiguous federal structure unites relatively more resources in the defense of relatively less border.

Geometrically speaking, for any given two polygons on a common plane, their junction will result in a combined circumference equal to all linear sections of each less those which are equally a part of both. The new circumference will correspondingly always be less than the sum of the original circumferences. It will be their sum less twice their common border. Alternately, the conjunctive area of the same two polygons, will always be equal to the sum of the areas of the polygons so joined, without any subtractions, making the unity of polygons axiomatically causal of greater area than circumference.²⁶⁹

This may be of less importance when the lands of one partner are desolate wastelands without economic or military value. However, even so, the relative diminution of vulnerable borders tends to ease the sectional strain which normally entices allies into a foolish division of military forces. It also loosens the geopolitical constraints which force upon smaller states a static defense. Thus, the federation is better suited to the correct military doctrines of surprise, maneuver, and concentration of force than are un-federated states, even in alliance. In the case of air war, or attack from above, confederation is still productive of greater strength for each member, but not due to relative increases in area over border circumference, as circumference is less relevant to missile, aircraft, and space attack.

Some accessions of land will be even more valuable than geometry would suggest, depending on accidents of topography, mineralogy, etc. For example, the accession by a landlocked power of a maritime precinct can be a financial or strategic benefit out of all proportion to its mere size.

²⁶⁹ See Generally, Euclid, *Elements*.

In some cases a confederation may eliminate the members' military concerns so perfectly that the balance of powers is destroyed and the confederacy itself becomes a threat. The formation of Germany in the late 1800's comes to our mind, although this may more properly be a consolidation than a confederation. Still, if confederation happens to entail a temporary weakness due to the scanty resources or geographic discomfiture of an accession, these weaknesses are invariably cured over time by the non-military benefits of confederation, which eventually translate into military strength. Thus, as was the case with the mixed constitutional format, the federal arrangement optimizes the military strength of those who adopt it.

We do not hold, however, that the marriage of a harmonic constitution with an ideal federation is a foolproof recipe for military success. There remains the paramount need for ideal military leadership, without which no nation, however constructed, can long survive. The short-lived Achaean Federation was a political masterpiece, but the military incompetence of Aratos squandered it. Even the Greeks of the Delian League, at the pinnacle of their power and glory, could not have avoided destruction by the likes of young Alexander the Great, for in him was a captain of truly transcendent genius, and his army was an instrument as fine as was ever fashioned for war. It is impossible for us to forget old Parmenio, the fire-wagons at Mt. Hameus, crossing the frozen Parapamisus, and the watery march around Mt. Climax. We cannot contend that any political association alone can withstand such an inspired and refined onslaught. Ultimately, *sarissa* must be met with *sarissa*, *syntagma* with *syntagma*, phalanx with phalanx, and most critically, military genius with military genius, if peace and justice are to prevail. This is a precarious maxim, but it remains the epitaph of Greek civilization, as well as so many others.

We do note, however, the amazing resilience of the Roman Republic's federation of allies in the face of Hannibal, the African genius of war who annihilated and held at bay forces ten and fifteen times the size of his own for ten years running. The Roman republican constitution proved amazingly durable, for most Roman allies remained, on the whole, faithful to Rome despite her military humiliations. However, Rome's federal constitution did not defeat Hannibal. It only afforded Rome more time to beat him. Ultimately, the legions under Fabius, Marcellus, Nero, and Scipio had to do the job. At the beginning of the war, Rome had no military geniuses in the field. Her commanders were lackluster and often incompetent. Rome's constitution provided time for talented commanders to come to the forefront and hone their abilities. The Roman political association alone could not have withstood such an ingenious and tenacious onslaught forever. Ultimately, as we have said, *gladius* must be met with *gladius*, legion with legion, and military genius with military genius. Carthage's genius was Hannibal; Rome's genius was, in great part, its constitution.

THAT A FEDERATION'S NON-MILITARY BENEFITS ARE SO HIGHLY VALUABLE THAT THEY OFTEN OUTWEIGH AND EVEN OBSCURE THE FEDERATION'S ORIGINAL SECURITY PURPOSE

In addition to the security achieved by the confederate structure, it yields several incidental benefits so highly valuable to humanity that they often outweigh and even obscure the primary security focus of the confederation. The greatest ancillary benefits of the federation are, first, its separation of powers characteristics, second, its ability to effectively extend a government's administration over a very broad expanse of territory, and third, its economic benefits. Together, these introduce long-term benefits so powerful that they often become more important than the immediate military benefits. This salutary effect of the federation renders it intrinsically attractive as a constitutional device, productive of a greater degree of liberty among the participating states than could otherwise be achieved.

THAT STATE ECONOMIC HEALTH CAN BE UNIQUELY ENHANCED BY FEDERATION, WHICH FURTHER INURES TO MILITARY SAFETY

The natural object of confederacy, namely security, is advanced by the federal system not merely by the summation of the means of defense, but by the multiplication of economic power which the confederate structure can evoke through policies of free trade among the members. The augmentation of stability tends to attract capital, and in this sense, the fortification of liberty resulting from the federal separation of powers will itself tend to strengthen the economic health of the group by attracting greater foreign investment. However, if the principles of free enterprise and free trade are enforced, economic power will be further amplified. This increase proceeds from natural economic forces such as economy of scale, competition, and currency stability. Together, these increase efficiency by directing capital into the most productive uses, resulting not only in a better standard of living, but in an enhanced capacity for military defense.

This contention builds upon Keynes' comments regarding the effects of short and long term expectations on the scale of investment.²⁷⁰ Keynes postulated that "the scale of investment depends on the relation between the rate of interest and the schedule of the marginal efficiency of capital corresponding to the different scales of current investment, whilst the marginal efficiency of capital depends on the relation between the supply price of a capital-asset and its prospective yield."²⁷¹ All parts of this formula are negatively affected by political instability, and the result is decreased investment. Political instability results in legal uncertainties, internal violence, and disrupted markets. These in turn immediately alter a nation's balance of trade, and

²⁷⁰ See Keynes, *The General Theory of Employment, Interest and Money*, Chapters V and XII.

²⁷¹ Keynes, *The General Theory of Employment, Interest and Money*, Chapter XII, Part I.

usually constrain the subject nation to adjust interest rates, in response either to the pressing need to finance a government response to the unrest, or to remedy the skewed balance of payments resulting from the market dislocations. Such activity cannot but destabilize currencies, deterring foreign investment and weakening the industrial and economic base of the country.

The political stability of the federal structure tends to stabilize currencies, which in turn reassures investors that their foreign-denominated returns will maintain their relative value after exchange rate fluctuations are taken into account. Increased political stability will tend to lower the risk of default or domestic disturbance to outside investors, thus augmenting foreign investment. Reduction of exchange rate fluctuation will have the additional effect of reducing the quantity of foreign cash reserves member states must hold, thus easing their balance-of-payments requirements generally. Moreover, such an augmentation of investment will tend to increase the values of member currencies, boosting imports to the confederacy and thus enhancing the interdependence of regional states and the relative purchasing power of the federal citizens. As these examples demonstrate, state economic health can be uniquely enhanced by federation, which further inures to military power.

THAT FEDERATIONS INTRINSICALLY PROVIDE AN ADDITIONAL SEPARATION OF POWERS, ENHANCING CON- STITUTIONAL STABILITY AND LIBERTY

The federal structure intrinsically provides a vertical separation of powers in which each member experiences a reduction of sovereignty, enjoining an interdependence which in turn checks the unfettered authority of the central government, regardless of the constitutional format of the member states. As a result, the latitude for belligerence and rancor among the members is greatly reduced. Moreover, the ambitious from one member encounter great obstacles to their usurpations among the others, obstacles which would not exist if the same states were an un-federated monolith. As the federation grows, such overreaching individuals are progressively unable to work the same frauds or exercise the same leverage on other members.²⁷² Its very structure thwarts such vices of human ambition.

THAT FEDERATIONS ALONE CAN BOTH PROJECT STABLE POWER OVER MYRIAD PEOPLES THROUGHOUT VAST TERRITORY AND DEFEND THEM RELIABLY

The most phenomenal feature of the republican federation is its ability to govern and defend many diverse peoples over extended territories, since even harmonic constitutions, when un-federated, are unable to do this well. Hence, if correctly managed, it can grow larger and stronger than any other type of state. Monarchies are excellent at military defense, but they are inept at management of large territories. Conversely, republics excel at managing the affairs of far-flung peoples and territories but are militarily inefficient. When republics confederate, they are able to combine all the

²⁷² Montesquieu, *The Spirit of the Laws*, Part II, Book IX, Chapter I.

military advantages of Monarchy with the managerial prowess of a Republic. A federation of republics is therefore a uniquely powerful design, for it excels at both managing and defending large territories. Let us consider this in more detail.

Montesquieu observed that federal republics have “all the internal advantages of a republican government and all the external force of Monarchy.”²⁷³ Monarchies excel at repulsing external threats due to their efficient centralized power, yet when they grow large, this centralization fails to be politically efficient. They become progressively inflexible and unresponsive as the territory and population increase. The inflexibility is multiplied as the national territory grows beyond the government’s effective grip. There being no representatives to press upon the central government the requirements of distant territories, a dual deficit of information and motivation arises and the state is no longer able or willing to make productive decisions regarding the government of those outlying areas. When a central government loses touch with the needs of remote provinces, its actions with respect to such areas become arbitrary and tyrannical even when motivated by benevolence.

Even the most enlightened Monarchy is converted into a despotism in spite of itself when it becomes large. This becomes all the more plain when one notes that of all constitutions, monarchies are by nature the most centralized. As Tocqueville rightly noted:

A central power, however enlightened and wise one imagines it to be, can never alone see to all the details of the life of a great nation...When it attempts unaided to create and operate so much complicated machinery, it must be satisfied with very imperfect results or exhaust itself in futile efforts.²⁷⁴

Conversely, mixed constitutions, especially republics, are exceedingly agile at handling the details of a vast state and can easily resist the internal tensions which often destroy a Monarchy. Unfortunately, they are still no match for monarchic military efficiency. Being slow, deliberative, and constrained by the checks and balances of myriad competing interests, the mixed constitution is inefficient by design, and often cannot defend itself swiftly and efficiently against external threat. This is particularly so if it has a weak executive branch. Thus, Republics tend to be short-lived when seriously and persistently threatened by efficient military powers.

Rome is an excellent example of this principle, for when that state was set up as a Kingdom it could not grow large, yet, almost without exception, it energetically met and defeated its enemies on their own soil. As soon as Rome became a Republic, however, it expanded at a furious rate, but became slow to defend itself and many times had to deal with invaders at its own doorstep. Hence, it had lost the military virtue of Monarchy and acquired in its place the civic virtue of the Republic. The Republican office of dictator was a makeshift attempt to retain some of this lost efficiency. Finally, when the Roman Republic began to confederate with the Latins and later the Campanians, it returned to assertively waging and winning wars not at home, but in the enemy’s own territory, and yet as a federal Republic, it could also exert effective control over a vast array of differing Italic Tribes. Thus, as a Federal

²⁷³ Montesquieu, *The Spirit of the Laws*, Part II, Book IX, Chapter I.

²⁷⁴ Tocqueville, *Democracy in America*, Part I, Chapter V, Section XII.

Republic, Rome was able to marry the virtues of Monarchy and Republic, without inheriting the evils of either, able both to govern wide territories and wage energetic military operations.

In summary, republics can reliably grow large but are militarily handicapped, while monarchies can be militarily efficient but cannot grow large without disintegrating from within. The federal form, when it is composed of mixed governments, combines the advantages of both the monarchic and republican constitutions, without necessarily inheriting the evils of either. It has centralized power to resist outside threats and diffused internal power to accommodate sectional incongruities and regional interests. Moreover, such a federation of republics can easily be enlarged by the entry of new associates, whose sectional idiosyncrasies provide no obstacle to the accession.

This ease of expansion is of critical importance to the ideal system of justice, for it affords ever-increasing economic power and political stability to the nation. It is with the foregoing in mind that we say that large federations are always superior to small; that well-ordered states must be large; and that secession, division, and complete local autonomy are never better than a single well-ordered federal Republic. There is another reason why large federations are superior to small. As Madison relates, bigness increases the number of factions competing for favorable political outcomes, a fact which tends to prevent the formation of a tyrannical majority faction. This preserves the freedom of the minority factions and ultimately the individual.²⁷⁵

THAT FEDERATIONS CONTAIN A NATURAL SAFEGUARD AGAINST CENTRAL TYRANNY OVER THE MEMBER STATES

Federations, while the strongest and most salutary form of political association for the reasons already stated, contain a natural brake upon the tendency of their central power to tyrannize the members. Though a federation affords the strongest configuration of national power, its central government is in one sense weak; it cannot easily dominate and subjugate its own members. Indeed, it is crucial to the relative stability and liberty of the whole edifice that it be weak in this single respect. In a properly balanced federal arrangement, the power of the members and that of the federal government are kept in that proportion which makes secession practicable. When this proportion obtains, the tendency of the federal power to tyrannize over the members is naturally stayed by virtue of the risks such tyranny presents. The potential for secession is the key to deterring federal tyranny, and it is this reason that federations, when healthy, tend slightly toward dissolution more often than central tyranny. Members depart before submitting to political enslavement. Their departure is not always a product of their own initiative exclusively, but will often be assisted by the predatory designs of neighbors who find their own advantage in compromising and fracturing the power of the united federation.²⁷⁶ A federation will always provoke adverse coalitions of members and outside states if it behaves tyrannically. This weakness of federal governments acts as a fuse or circuit breaker, preventing tyranny over the members by diminishing central power whenever it becomes insufferable.

²⁷⁵ Madison, *The Federalist On The New Constitution*, Number X.

²⁷⁶ See Madison, *The Federalist on the New Constitution*, Number XVIII.

It is the hallmark of federations that a deterrent proportionality of power obtain between the central power and the members; when this is gone, there is no federation in practice. The central power has grown in America to the point that the nation's status as a federation is questionable. When the power of either side of the federal compact grows to the point of impunity, the federation is gone. A monolithic government will emerge if the federal power triumphs, and fragmentation will occur if member power prevails. Therefore, healthy federations must maintain an equal proportion of power in this respect, and the proportion itself deters either side from taking actions which incline to disproportionality. Thus, there is a natural brake upon both the central power's insolence and the members' refraction. Each must be moderate out of the grossest self-interest. Each must maintain the proportion in order to secure the benefits of union.

As for the criticism that the instability of federations in this regard argues against their utility in an ideal system of justice, we must consider the fact that the alternatives are far worse. Were federations not weak in this regard, tyranny would prevail. Their weakness risks disunion, but not necessarily war or tyranny. Moreover, this potential for civil dissolution is fundamentally different from the tendency towards revolution in the pure constitutions, for in them, the tendency is an unavoidable consequence and never deters its own eventuality, whereas the potential for civil war in a federation is a deterrent to the tyranny which would excite it and is thus a stabilizing factor. It is fair to accuse federations and pure constitutions equally of a revolutionary potential. The difference is that in federations the potential promotes stability.

THAT FEDERATIONS ARE THE MOST EASILY EXPANDED, AND THUS EASILY STRENGTHENED, FORM OF GOVERNMENT

The limited objectives of the federal authority makes the establishment of a confederation easier than either the reconstitution of a state or the merger of several states, undertakings equally marked by extreme risk and uncertain reward. States are less adverse to ceding a portion of their sovereignty to a federation in exchange for benefits than undergoing a complete organic synthesis with another state. The confederacy supplies a protocol and methodology for expansion which is far more effective than conquest or colonization, affording neighbors a measure of independence protected by a mutual security. These are but a few of the advantages over outright merger offered by the adoption of a federal compact by a group of mixed governments. Moreover, there are risks attendant to the merger which make it even less attractive, not the least of which is the uncertainty surrounding the format of the resulting state.

The United States devised a legal framework for expanding by addition of new member states in legislation known as the Northwest Ordinance. This powerful statute provided a clear, specific, and orderly method of expansion, and it preserved the equality of member states, new and old. As a new membership procedure, however, it should have been part of the Constitution and protected by that document's supermajority amendment procedures. As a statute, it was subject to the majoritarian whim of the member states.

THAT THERE ARE TWO TYPES OF FEDERAL POWER: DIRECT AND INDIRECT; THAT OF THE FORMER IS IRRESISTIBLE AND THE LATTER, PRECARIOUS

Federal systems containing a central authority can be structured in two ways, as Hamilton explained in *The Federalist* and as Kent reminds in the *Commentaries*.²⁷⁷ The central authority can either announce its dictates to the member state governments, and rely on these units in turn to execute the central policy, or it can act directly upon the citizens of the several member-states, bypassing the machinery of the member-state governments. Throughout history, the former system has been the most common, but unsuccessful, form of confederation, while the latter has been largely successful. In America, the Articles of Confederation used the former system, the Constitution of 1787, the latter.

Although there seems to be no standard English phraseology to distinguish these two styles of federation, they are respectively direct and indirect in their exercise of power upon the people. The direct federation contains a central authority which has the power to enforce and execute its acts directly upon the federal citizens, whereas the indirect federation acts upon the member governments only, relying upon their machinery, and their pleasure, to enforce its law among their citizens. Kent was clear in denouncing indirect federations, pointing out that “this formula has proved pernicious or destructive to all...federal governments which adopted [it],”²⁷⁸ and Hamilton observed that “it has been the cause of incurable disorder and imbecility [in] government...[It is] the parent of anarchy: It has been seen that delinquencies in the members of the Union are its natural and necessary offspring.”²⁷⁹ Regarding the American Articles of Confederation, Hamilton explained that:

...the united states [under the articles of confederation] has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option...The great and radical vice in the construction of the [Articles of] Confederation is [therefore] in the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist.²⁸⁰

²⁷⁷ Hamilton, *The Federalist on the New Constitution*, Number 14; Kent, *Commentaries*, Volume I, Part II, Lecture X.

²⁷⁸ Kent, *Commentaries*, Volume I, Part II, Lecture X.

²⁷⁹ Hamilton, *The Federalist on the New Constitution*, Numbers 9 and 15.

²⁸⁰ Hamilton, *The Federalist on the New Constitution*, Number 15. (Caps in the original removed.)

Regarding the same indirect federal system, Kent identified the same deficiency, namely that:

[The Articles of Confederation,] in imitation of all the former confederacies of independent states, either in ancient Greece, or modern Europe, carried the decrees of the federal council to the states *in their sovereign or collective capacity*. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow; and it has proved pernicious or destructive to all other federal governments which adopted the principle... The history of the federal governments of Greece, Germany, Switzerland, and Holland afford melancholy examples of destructive civil war springing from the disobedience of the separate members...²⁸¹

Thus, the choice of a direct confederate format over the indirect variety distinguishes those which endure from those which perish. The reason for this is elementary. We have seen time and again that all political power derives ultimately from the people.²⁸² When federal laws reach only member governments and not the people directly, they reach only skin deep, failing to reach the political muscle of the society. Member laws remain dominant, though nominally subordinate, since they reach the people directly. Enforcement of the smallest federal law, when handled by member states themselves, becomes discretionary, subject to the turbulence and caprice of sectional designs, and every failure of enforcement, however small, must either be tolerated by the whole federation or there must be civil war, for the federation will have no particular enforcement machinery of its own; its lamentable choice will be between civil war or a lapse into irrelevance and oblivion. The former entails the maintenance of a large federal standing army, introducing the constant peril of a general collapse into military despotism; and the latter is no federation at all.

Federations will naturally try to avoid civil war. Indirect federations therefore usually tolerate the milder transgressions of a member; the remaining member states will then adopt the only corrective measures at their disposal, namely reciprocal disobedience to federal law; and this ripple will not stop until every member has regained equality by lawlessness of equal degree. The uncertain calculus of retaliatory disobedience combines with the natural inclination of states to seek their immediate advantage, resulting in an exodus from all federal law, ending only when no federal law remains whatsoever. Therefore, it is clear that no stable federation, and hence no ideal system of justice, can be established unless a federal power carries its laws to the citizens directly. It must be able to effect the enforcement of its limited authority directly upon individuals. Refractory individuals can be dealt with under the rule of law, but refractory states involve the entire society in the Hobson's choice of revolution or confederate disintegration. For these reasons, the use of an indirect federal structure is to be scrupulously avoided.

²⁸¹ Kent, *Commentaries*, Volume I, Part II, Lecture X.

²⁸² "The strength of a state...depends directly on the strength and energetic character of the people" *The Sophomoric Discourses*, Book VI, Chapter III; see also chapters IV and V.

Not merely theory but history itself teaches, with unmistakable emphasis, that the indirect federation is an unstable, untenable and ultimately unacceptable political structure. This much is clear from the summaries of indirect federations in the *Federalist*: the Amphyctionics, The Delian League, The Swiss Confederation, The Helvetics, United Netherlands, The Polish Confederation, and America under its first Confederation.

Indirect confederations tend to disintegrate in yet another way, one especially dangerous because rooted in benevolence. The risk of losing a member state can induce the entire group to permit one member to disregard a particularly onerous law as a matter of accommodation or comity. In the short run, toleration of one member's refusal to observe federal law may conduce to harmony and cohesiveness. However, this is actually a de-facto amendment of the confederation's constitution. It essentially repeals the normal methods of legislation, execution, and adjudication and substitutes instead an ad-hoc government driven by the fickle pleasures of each member state. This type of accommodation immediately substitutes the temporary and turbulent passions of the members for the regular rule of law; the principle of limited and defined government is prostituted to the utility of a temporary and likely illusory concord among the members. A member's refusal to obey federal law may result in civil war, but a concessionary toleration by the other members is more usually the result, and this eventually unravels the entire confederate constitutional fabric, since the odd refusal to cooperate will evolve into a general quid-pro-quo flight from constitutional fidelity, as each nation tolerates the infractions of the others, secretly biding their time until they can demand a like concession.

We must not pretend that such events are unknown to actual confederacies. The French, as a member of the European Union, unilaterally refused to abide by the confederate procedure of majority rule for determining certain issues of acute importance to it alone. Instead of risking union disintegration by insisting on France's fidelity to the confederate law, the so-called Luxembourg accord was negotiated, which held that in matters of particular interest to specific members, the constitutional provisions for decision making could be made on a case-by-case basis. This is nothing more than rendering the constitution defunct at the tactical insistence of any member at any time. No federation ought to allow a member state to extort a right from the rest, unilaterally to insist on a constitutional change, even when this right is extended to the stubborn member in a spirit of good-natured accommodation on behalf of group unity. Such accommodation will eventually unravel the entire edifice of the confederation. The indirect federation is intrinsically prone to this very type of extortion, whereas the direct federation, operating on the peoples directly, faces no such resistive power as an entire member state in the enforcement of laws, facing instead only recalcitrant individuals.

Actually, a stop-gap measure short of civil war, whereby the *indirect* federation can reliably gain and coerce the cooperation of the members, is to raise routinely a considerable revenue and then distributing it to members as charity. These gifts, if disproportionately large compared to the member state's own budget, will serve as an enforcement mechanism, for non-compliance with federal laws may then be punished by suspension of this federal money. Such federal financial coercion eliminates much of the small scale recalcitrance and disobedience of member states. It elicits cohesion and obedience whenever the receipt of the federal money is more valuable than would be the dereliction from federal law. Nevertheless, some member interest will eventu-

ally exceed the extortive power of the federal purse, and the inherent weakness of the indirect federation will reemerge. The drawback to such federal financial coercion is not simply that in the most grievous cases it fails. In order to be totally effective, it by definition must fatally upset the balance between the federal power and that of the member states, rendering the entire edifice vulnerable to overthrow by the federal authority, destroying therewith the tremendous benefits of the federal form of constitution.

The European Union is an instructive modern example of an indirect federation. According to its constitution, the central authority legislates by passing regulations and directives which are binding on the member states. These member states are then obliged to ensure the fulfillment of these obligations by taking appropriate measures on their own.²⁸³ On paper, therefore, the European Union is a classic indirect federation. However, in practice, it has become far more direct, and owing to this it maintains its tottering existence. Its direct nature arises from the interpretations of the Court of Justice, which held that the Union regulations and even some directives bestow rights directly upon member state citizens, who are entitled to have such rights recognized by member state courts in actions amongst each another or against a member state itself.²⁸⁴ In European jurisprudence, this doctrine is known as 'direct effects.' By application of the direct effects doctrine, the European Union emerges as a hybrid, designed on paper to be an indirect federation and interpreted by its court to be direct in operation. The European Union also makes extensive use of federal financial coercion, which we have already seen to result in a short term trivial obedience among members, at the price of an over-strong federal power. Thus the indirect European Union hobbles along on two crutches, direct-effects interpretations and federal financial coercion, both made necessary by the flaw of indirect federation. The example of the European Union underscores the weakness of indirect federation and vindicates Hamilton's admonition in the *Federalist* that, "as far as the principal [of indirect federation] has prevailed, it has been the cause of incurable disorder and imbecility in the government."²⁸⁵

THAT THE IDEAL FEDERATION BLENDS BOTH INDIRECT AND DIRECT FEATURES.

The very idea that federations might operate upon citizens but not upon member-state governments gives rise to a very troublesome notion, specifically, if a federation does not operate on the member-states, how can it be a federation of states at all? And since the United States, in particular, claims that the states are not acted upon at all by the federal authority, is the United States really a federation of states? The answer is that the American constitution blends aspects of both direct and indirect federation; and the wider political lesson is that federations must in some aspects contain both.

In the *Federalist*, Madison explained that direct federal powers predominated in some departments of American government, making these appear 'national' rather than federal, while indirect federal principles controlled other departments, which consequently bore a more federal image:

²⁸³ *Treaty of Rome*, Article 189 read with Article 5.

²⁸⁴ See *Van Duyn v. Home Office*, Case 41/74 [1974] ECR 1337.

²⁸⁵ Hamilton, *The Federalist On the New Constitution*, No. 9.

The difference between a federal and national government...is...that in the former the powers operate on the political bodies composing the confederacy in their political capacities; in the latter, on the individual citizens composing the nation in their individual capacities. On trying the constitution by this criterion...we find it neither wholly national nor wholly federal...[It is] in strictness, neither a national nor a federal constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.²⁸⁶

Madison meant, first, that the origin of the constitution, *its foundation*, is federal: it was a plan unanimously adopted by the member states as independent sovereigns, not by any majority of the people. It is therefore a federal act. Second, the officers of the government are elected in partly federal, partly national manners: Representatives are elected by and in direct proportion to the numbers of the people and are in this sense nationally derived, whereas Senators derive from the States as equals in a distinctly federal manner. The President is elected by a compound formula in which the majority of the people forms one element and the influence of the states *as equals* forms the other. The weight of both thus impacts the executive choice, making it a mix of federal and national character.

Third, the federal laws fall on the people directly, not on the states as states, and in this crucial respect, the American government appears *national* rather than federal. This is the key to the unity and solidity of the federation, the element which makes it operationally viable. The reverse ideal kills the federal government's law enforcement ability. We have called this direct federation as opposed to indirect, but we can now see that it is actually a kind of semi-federalism: federalism with a predominantly national character in its operational aspects, a national federation.

Fourth, American federal powers are limited by strict enumeration and cannot intrude upon matters reserved to the states. The states thus survive as independent sovereignties with separate authority within the federal group. In this respect, the government again seems distinctly federal and not national. Indeed, this is *the definitive feature* of federalism. Still, disputes among states are heard by the federal court, which adds a degree of national character even to this definitive federalism. This guards against federal collapse from war among members.

Fifth and lastly, Madison meant that amendments to the constitution are both federal and national character. They can be proposed by two thirds of Congress, a national method, or by two thirds of the States, a federal arrangement. They are made effective either by ratification of three-fourths of the state legislatures, or by three-fourths of state ratifying conventions. This is a federal arrangement, and yet the option between legislative or convention ratification is left to Congress, placing a

²⁸⁶ Madison, *The Federalist On the New Constitution*, No. 39.

national character on the otherwise federal-style ratification. For these reasons, Madison claims that the American Federal constitution is “in strictness, neither a national nor a federal constitution, but a composition of both.”²⁸⁷

The political lesson is that federations must be mixed in this manner or perish. Certain parts must be national, or ‘direct,’ and others federal, or ‘indirect,’ for a stable federation to exist.

THAT PURE FEDERALISM IS THE OPPOSITE OF IMPERIALISM.

Pure federalism is the opposite of imperialism, and this in three important respects. Imperialism, or rather its product, empire, is the non-consensual and absolute authority, or *imperium*, which one state establishes over another without mutually integrating with the legislative element of that servient state. On the contrary, pure federalism is opposite in three ways. First, it is consensual; second, it maintains equality between states; and third, the states achieve mutual legislative integration through each’s influence over the central authority.

Looking at these points of opposition individually, it is clear that pure federalism is the opposite of imperialism because, first, the former is based on the consent of member states. Consent of the member states to the federal arrangement is the hallmark of pure federalism. Lack of consent defines the corrupt federation. An identical lack of consent defines an Empire. Corrupt federalism is where states’ membership is coerced. Empire is where a state’s obedience is coerced, in the manner already explained. Thus, duress is the glue of the corrupt federation, just as it is the glue of empire. In this respect, the corrupt federation is identical with Empire. Both feature the non-consensual and absolute authority, or *imperium*, which one state establishes over another.

Second, federalism also differs from imperialism by maintaining equality between states. In a pure federation, there is no dominant state or group of states; rather, each is equally independent and servient to the central authority which they establish and to whose authority they consent.

Third, federalism is the opposite of imperialism because under federalism the states achieve legislative integration through their mutual influence over, and obedience to, their central authority, whereas under imperialism, the dominant state does not tolerate legislative influence from the servient state. Rather, it dictates legislative matters thereto. It may allow the servient state to retain executive and popular elements for administrative convenience, utilizing these like bureaucratic subdivisions. For example, servient executives may be permitted to function as governors to carry out the dominant state’s laws. The servient judiciary can likewise be maintained as an administrative appendage of the dominant state. However, under imperialism, the servient’s independent legislature cannot be tolerated, nor can its people’s independent consent power with respect to legislative matters. In summary, this difference between federations and empire is that the latter permits the servient state degrees of

²⁸⁷ Madison, *The Federalist On The New Constitution*, Number . Our analysis assumes a post-17th Amendment Senate.

self government only in executive and judicial matters, but never in legislative, whereas mutual legislative influence is a requisite of pure federation.

Some may wonder why a monarchy which establishes empire over another monarchy is not thereby legislatively integrated with that servient state, as they are both subject equally to the legislative will of a single monarch. When a nation is itself a monarchy and achieves absolute control over another state, there is but a nominal difference between the status of the subjects of each, and no subject has any legislative power, even those of the dominant state. Are they not integrated in their incapacity? This is why the integration required of a federation is by necessity legislative. Only in this sense can the domination of a monarchy by another be seen as truly imperial. To the extent that legislative power of a servient state is coerced or denied, this is the measure of imperialism.

THAT IMPERIALISM IS THE NATURAL EXPANSIONARY MODE OF CITY-STATES, WHEREFORE THEY ARE A FAILED TYPE OF POLITICAL ASSOCIATION.

The Greek city-states destroyed one another and were eventually conquered by a federation, though they tried to confederate on many occasions and eventually perfected the federal form, for a shining moment, in Achaia. With few exceptions,²⁸⁸ the Greek confederacies featured no legislative integration among members and were dominated and perverted eventually by one or more members, which shows that there was in reality little federation, but rather mainly imperialism.

This is the light in which we must see the epic struggle between Athenian “democratic” imperialism and Spartan imperialism in the Peloponnesian war. Nominally, two confederacies were at war; in reality, it was a contest between imperialisms. Athens and Sparta could not bring themselves truly to confederate with anyone, a fact which later tragically doomed the Achaean League. The reason for this is that the city-state format is incapable of achieving the legislative integration necessary to pure federation, and both Athens and Sparta were uncompromisingly wedded to the city-state system. Among associated city-states, there is no format for institutionalizing the legislative influences of member states upon one another. They are constrained merely to implore one another and threaten secession or oppression if ignored. This is not an institutional mutual influence. The only true institutional influence is an ability of each state to exert a quantum of legislative force directly upon the citizens of every other state. In this way, each cedes a degree of legislative autonomy and receives in its stead a measure of legislative authority over the other states involved. As city-states *par excellence*, this is something Athens and Sparta would never tolerate, down to their dying day. Each preferred, and finally suffered, complete enslavement to any federal scheme wherein others could participate equally on important matters. Stubborn to the last, each would either dominate or be dominated, never anything in between, which is the territory of federalism. Thus the curse of the city-state reveals itself, it is a political format incapable of legislative integration with others, and hence unable to participate in federalism.

²⁸⁸ Notably, the Achaean, Lycian, and Aitolian Leagues.

Mutual legislative influence is the real glue of the federation. It is this which creates in the citizenry of each member state a durable feeling of identity with the whole. When this influence is absent, the only remaining ties are evanescent military and financial needs. Their military incentives to federation vanish either by destruction of the military threat or defeat of the federation itself. The financial incentives to remain federated recede when members become immensely wealthy. When the military and financial motives dissipate, the federation will fragment, unless there remains some ideological compulsion to remain federated. This is often referred to as a national sentiment, patriotism, or plain nationalism, a heart-felt belief by the citizens of the members that they are intrinsically a part of the whole, that they are primarily Federal citizens, and only secondarily citizens of their respective member states. This sentiment can be the result of indoctrination, or participation in great federal projects and successes. But these will not lastingly support the sentiment. Being specific to a generation, they will fade with the coming of a new generation. The only way reliably to create and maintain this national sentiment is to give each citizen some legislative authority over the federation, and thereby over the citizens of the other member states. In this way, the citizens will believe that they are a part of the whole, as they have some control over the whole and all of its parts. This flows from what we have said about an individual's identity, namely that identity is property, which is the extent of one's control. Only when the citizens exercise a share of legislative power over all the other federal citizens do they have any control over, and hence identity with, the federal whole.

This is another aspect of the superiority of legislative over executive and judicial power. Legislative power creates more sense of identity since it entails more control over things than do executive or judicial power. The people will feel more a part of a thing or organization if they have some legislative control over it than if they have executive, or only judicial, control. This is obvious from the general desirability of supervisory compared to supervised jobs, and it also accounts for the tendency of management to sympathize with the firm more than do laborers, who usually do not view the enterprise as part of themselves.

It was the lack of such mutual legislative influence that permitted the vast British Empire to break up. The dominions of the British Empire, such as Australia, New Zealand, and Canada, became self-governing in most matters save foreign affairs and were permitted to create their own constitutions with the blessing of the British Parliament. Westminster retained no legal authority over the domestic affairs of such home-ruled dominions; neither did it grant them any legal authority over its own. Great Britain and its several dominions were thus legally separate entities bound together by thin cords of necessity and ideology. The continued fidelity of the dominions was based on financial and military necessity, and supported by a jingoistic and often racist ideology of imperial togetherness. When the dominions gained economic self-sufficiency and military safety, however, they had no reason to remain part of the British Empire save patriotism and habit. These weak bonds were rudely severed by Britain's mishandling of the dominion's army contingents in World War One, and they were insufficient to inspire allegiance to Great Britain after her reduction in status following World War Two. In the post-war environment, the various members of the British Empire had no reason to remain in it, and most had self-serving reasons to exit. Great Britain lacked the brute strength to enforce their continued membership, and the result was that the British Empire vanished.

Thus, we can view the same lesson from two angles: City-states fail because they cannot be federal, but only imperialist; and again, Empires succeed only when they

cease to be imperial by becoming federal, i.e., when they give power over themselves to their erstwhile dominions. It is the same lesson. A truly durable structure results only from mutual legislative influence, a thing impossible to city-states and empires.

THAT FEDERATIONS ARE STRONGEST WHEN COMPOSED OF SIMILARLY STRUCTURED MEMBERS, IDEALLY HAVING MIXED CONSTITUTIONS

Montesquieu's championship of republican confederations, that is, those composed of mixed governments,²⁸⁹ is particularly noteworthy in that it emphasizes that federations whose members have monolithic governments tend to be weak and unstable. His examples of federal failures stemming from the incompatible formats of member-states included the Federal Republic of Germany and the Greek Amphictionic Council.²⁹⁰ This passage of Montesquieu is adduced by Madison in *The Federalist* in support of the 'republican form of government' clause, which "guarantee[s] to every State in this Union a Republican Form of Government..."²⁹¹ Not only are unmixed governments loathe to confederate at all, but, they are a cankerous inconvenience to the federation due to their intrinsic instability. The separation of powers in federal member governments is immensely beneficial for the overall liberty and stability of the federation. As we shall consider next, this separation of powers at the member level should also admit of the harmonic balances prescribed for the larger federal government.

But before proceeding to that topic, we must note parenthetically that the requirement for homogeneity among federal members is merely an instance of the homogeneity requirement as it applies to all political units, be they nations, confederate members, or political subdivisions thereof. Rome encountered its most violent civil wars owing to the uneven patchwork of states within its federal structure, for the federal rights and duties of each were ad-hoc results of thousands of unrelated military and economic contests, and no uniformity existed between the status of each and its relationship to Rome. America avoided this problem by enacting the Northwest Ordinance, which imposed a uniformity on newcomers to the American federation. Constitutional homogeneity breeds peace among political entities. And although many assume that this is only the case in democratic systems, it is actually a truism for all constitutional formats; they tend to act more peaceably towards like constitutions than differing ones. When Rome expelled King Tarquinius and established a Republic, he turned to Clusium's King Porsinna for help, persuading him by warning that he ought:

²⁸⁹ We make this implication on Montesquieu's behalf, since he uses the term Republic equivocally, as earlier shown, to mean either pure Democracy or pure Aristocracy, governed by the rule of law. He then teaches throughout Book XI that the notion of the 'rule of law' itself requires a separation of powers. Hence, it is hardly unfair to apply his own conclusion to his definition. The subsequent popular belief that a Republic is a mixed constitution proceeds in part from this indelible lesson.

²⁹⁰ Montesquieu, *The Spirit of the Laws*, Part II, Book IX, Chapter II.

²⁹¹ Madison, from *The Federalist*, Number 43, regarding the United States Constitution of 1787, Article IV Section IV Clause I.

...not to allow the growing custom of expelling kings to go unpunished. Liberty was sweet enough in itself. Unless the energy with which nations sought to obtain it were matched by the efforts which kings put forth to defend their power, the highest would be reduced to the lowest;...[and there would be] the end of monarchy...²⁹²

King Porsinna agreed and attacked Rome on Tarquinius' behalf. As this demonstrates, like-constituted governments tend to act cooperatively towards each other. Monarchs are sympathetic to the pressures and needs of other monarchs. They share similar outlooks, particularly with regard to questions of potential legitimacy and constitutional justice. For the same reason, democracies sympathize with other democracies and aristocracies with other aristocracies. So although all states compete with one another by nature, like-constituted ones do so somewhat less, as they are governed by analogous pressures and interests. Thucydides relates how during the Peloponnesian conflict, civil wars tore through Greece, as each Aristocratic faction within cities invited aristocratic Sparta to seize the city and establish the faction as the government, while the democratic leaders made the like entreaty to democratic Athens, each hoping to be made master and secure the friendship and support of a like-minded state, the aristocrats appealing to Sparta, an Aristocracy, and the democrats to Athens, a Democracy. In Thucydides' words, the rivalry between aristocrats and democrats in each city plunged Greece into a revolutionary inferno:

...So bloody was the march of the revolution...the whole Hellenic world was convulsed; struggles being everywhere made by the popular leaders to bring in the Athenians, and by the oligarchs to introduce the Spartans. In peace there would have been neither the pretext nor the wish to make such an invitation; but in war, with an alliance always at the command of either faction for the hurt of their adversaries and their own corresponding advantage, opportunities for bringing in the foreigner were never wanting to the revolutionary parties...Revolution thus ran its course from city to city, and the places which it arrived at last, from having heard what had been done before, carried to a still greater excess...the atrocity of their reprisals...Death thus raged in every shape; and, as usually happens at such times, there was no length to which violence did not go; sons were killed by their fathers, and suppliants were dragged from the altar or slain upon it

War merely intensifies the natural inclination of similarly organized states and like-minded factions to conspire with one another against the heterogeneous. Thus, to return to our original point, homogeneous constitutions are relatively more cooperative with one another than heterogeneous, and this is why a federation is best composed of similarly structured member-states. When one member is heterogeneous, strife is the natural result, and the federation will fall into some degree of dysfunction. Moreover, when the members do not all have mixed constitutions, the internal instabilities of the un-mixed members will again destabilize the federation, as

²⁹² Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book II, Chapter IX.

the constitutional cascade plays out in and among them. For all these reasons, federations should ideally be composed of members with mixed constitutions.

THAT THE INTRODUCTION OF POLITICAL CLASSES AND HETEROGENEOUS MEMBER-STATES DESTROYED THE ROMAN REPUBLIC

As we have remarked, the Roman Republic survived Hannibal's onslaught because of its allies' loyalty and the strength of its federal arrangement, which bought time for its officers to become experienced with the true art of war and its military rebuilt after disasters like Trebbia, Trasimene and Cannae. But the truth of the matter is that this federation was unstable and ill-constructed. It was not a federation of similarly structured members; rather each member had distinct rights and prerogatives, originating in the unique circumstances of its subjugation by Rome. It became a patchwork of dissimilar agreements which generated jealousies and resentment. Moreover, Roman citizens and officials stood legally above these peoples and subjected them to galling abuses and crimes, unpunishable because only a Roman citizen could bring an action against another Roman citizen. The member states and their peoples were thus helpless.

Interestingly, the members did not want to secede, rather they demanded full and equal Roman citizenship. This Rome steadfastly refused, in contrast to its early policy of granting Roman citizenship to nearly everyone, friend or foe. The superior political status of the Romans vis-à-vis the citizens of these member states finally pushed their anger to uncontrollable extremes, and the Roman Federation exploded into devastating civil war, the so-called Social War. This was truly a strange situation; a people warring against a federation, *in order to become an equal part of that federation*.

The Roman Aristocracy won the war, the Samnite areas were left in ruins, and a useless, watered-down form of citizenship was meaninglessly extended to all the federal members. But, for perhaps the first time, Rome learned no lessons from this war. By its end, the Roman constitution was in ruins, the Republic had yielded to corruption, greed, mob-rule, and the beginnings of warlordism. The Roman armies had become beholden to their leaders, who vied for personal domination of Rome. The war-wasted areas of Italy were repopulated with slaves and farmed for the benefit of the great families. Thus, the end of the Social War saw a consolidation of inequality, not an establishment of political symmetry and federal homogeneity. The political composition of the Italian peninsula became nearly irrelevant in Rome, particularly since Rome had by then conquered Spain, Sardinia, Sicily, North Africa, and Greece. This heterogeneous composition of the Roman federation was the beginning of the end of the Republic, and we cannot but note in passing that it probably encouraged Hannibal and his father to envision a successful invasion of Italy in the first place.

Rome's method of governing its overseas conquests introduced even more heterogeneous elements to its structure, which accelerated her ruin. Provinces were controlled by pro-consuls, more commonly called governors. A pro-consul governed the conquered province as would a consul his army. His power was thus nearly unlimited. This was an imperial system quite at odds with the constitution which governed Rome itself and its citizens, and it wreaked havoc with Roman politics. The tyranny available to Roman politicians who became governors was too great a temptation to

resist. They could serve a governorship, fleece the foreigners, and return with enough money to bribe the courts and senate into acceptance of what they had done, and have enough left over either to live in super-luxury or pursue plans of political megalomania. An example of how one governor conducted himself is emblematic of the overall problem:

The governors robbed on a large scale...Caius Licinius is also known as Verres, [was Governor of Sicily, and is the] most rapacious extortioner...that ancient history mentions;...[He] sold justice and public offices: he trifled with the law, his own edicts, religion, lives, fortune, and above all, the endurance of the provincials. During three years, not a senator of the sixty-five cities of Sicily was elected gratuitously. Once, for a small profit, he cut off a month and a half from the year, declaring that the first day of the ides of January was the first day of the calends of March...He gave cities to his friends...For the purpose of provisioning Rome, he had received from the province thirty-seven million sesterces. The money he kept for himself; and the grain sent to Rome was the result of his robbery. For his household, the province was to furnish him provisions, for which the Senate paid. Corn was worth two or three sesterces a bushel. He fixed the price at twelve, required five times more than was due to him, then caused the payment to be made him in money, on the scale of value which he had fixed...He equipped a fleet, requiring from the cities ships, sailors, arms, and provisions; but only for the purpose of selling the weapons and the supplies, and to the sailors leaves of absence and exemptions...The first time this fleet, so ill appointed, sailed out of the harbor, it was defeated, whereupon [Varres] ordered all the captains put to death; and again his lectors sold to the relatives of the condemned the privilege of having them killed at one blow...[T]heir friends crowded about the gate to have a last word with them, and there was Sestius the lictor putting a price on sympathy, a tariff on every tear. To enter, a relative must pay so much; to bring food to the prisoner, so much more. No one refused. "What will you pay me to behead your son at one blow? What for his body to bury instead of throwing it to the dogs?" And again they paid...But the guilty governors were numerous;...Verres was only possible because a hundred others had preceded him: between them and him the difference was only one of degrees...²⁹³

Thus, Rome was an abhorrent tyranny as to its provinces, even during the Republican period, and an onerous oligarchy as to its Italian federal members. Only at home was it a mixed constitution, and this was being rotted-out by the abuses in the federation and provinces. Rome's hideous system of governorships was mastered and abused by the likes of Marius, Sulla, Pompey, Crassus, and finally Julius Caesar. Extortions from the provinces paid the costs of the final reduction of Rome into an anarchy of warlordism, culminating in the civil war between Pompey and Caesar, which destroyed what was left of the Republic and ushered in the Roman Empire under Octavian. Thus, the introduction of political classes and heterogeneous member-states destroyed the roman republic

²⁹³ Duruy, *History of Rome and of the Roman People, From its Origin to the Invasion of the Barbarians*, Volume II, Section II, Chapter XLIV.

THAT FEDERAL MEMBERS MAY SUBDIVIDE THEIR TERRITORIES INTO QUASI-INDEPENDENT UNITS, AND BY SUCH MICRO-FEDERATION, GAIN ADDITIONAL STABILITY AND EFFICIENCY.

In addition to being an harmonically mixed government, each federal member state should be a federation in its own right, a procedure which, if done correctly, is an extension of the harmonic mean. Members should be composed of subdivisions so that they form a limited central government for their quasi-independent parts. There are several overwhelming advantages to this micro-federal arrangement. The first is an additional separation of powers which stabilizes members and renders them less prone to tyranny. The second advantage of such micro-federalism is the improvement of local legislation which results from tapping the knowledge and interest locals have regarding their own conditions. As Tocqueville explained:

A central power, however enlightened and wise one imagines it to be, can never alone see to all the details of the life of a great nation...When it attempts unaided to create and operate so much complicated machinery, it must be satisfied with very imperfect results or exhaust itself in futile efforts.²⁹⁴

A third advantage of micro-federalism is that it increases the participation of the people in government and boosts their civic spirit, as local offices and responsibilities proliferate. This strengthens the popular element of the state's constitution. It also kindles a sense of public spirit which aids thrift, cooperation and enterprise of all kinds. It seems to enliven each citizen's sense of his own legislative power over, and hence identity with, the whole. Tocqueville concurs in this conclusion, for he writes that:

...centralization only serves to enervate the peoples that submit to it, because it constantly tends to diminish their civic spirit...[Eventually, their] detachment from their own fate goes so far that if their own children are in danger, instead of trying to ward the peril off, they cross their arms and wait for the whole nation to come to their aid...When nations reach that point, either they must modify both laws and mores or they will perish, for the fount of public virtues has run dry: there are subjects still, but no citizens.²⁹⁵

A final advantage enjoyed by member states which micro-federalize themselves is that their energies and resources tend to be used more efficiently, propelling the subdivisions to a degree of prosperity impossible under any centralized scheme. Certainly, centralization may produce more dramatic immediate results, but such are short term, while the long term advantages are all secured rather by subdivision, as Tocqueville clarified:

²⁹⁴ Tocqueville, *Democracy in America*, Part I, Chapter V, Section XII.

²⁹⁵ Tocqueville, *Democracy in America*, Part I, Chapter V, Section XII.

... centralization succeeds, it is true, in assembling, at a given time and place, all the available resources of a nation, but it militates against the increase of those resources. It brings triumph on the day of battle, but in the long run diminishes a nation's power. So it can contribute...not to the permanent prosperity of a people.²⁹⁶

Respondent reminds the court that many of its states have adopted such justice-enhancing arrangements. We have taken notice of this and are surprised that it is not universal among the American states. So far, American micro-federalism has been piecemeal. Micro-federalism in America had its beginnings in the doctrine of inherent home-rule, which posited that municipalities had an inherent right to autonomy in local matters, deriving from either natural right, common usage, or, more creatively, the reservations of the 9th and 10th Amendments to the United States Constitution. Inherent home rule granted autonomy to municipalities in matters of local concern, and was endorsed by at least five states during the 19th century, with five others partially honoring the doctrine in judicial dicta.²⁹⁷ Nevertheless, the doctrine was repudiated by most states during the twentieth century. The sentiment behind the doctrine, however, experienced no diminution, and home-rule continued to be pursued within constitutional and statutory frameworks, with many states adopting constitutional provisions or statutes granting home-rule to municipalities.

A noteworthy example is the state of Colorado, which adopted such a micro-federal scheme shortly after its birth, affording the constitutional right to "Home Rule" for willing municipalities with populations in excess of two thousand persons. Presently, there are exactly fifty home rule cities in Colorado. Insofar as there are fifty American states, the existence of fifty home-rule municipalities in one of them is a distinctly fractal co-incidence. The scope of local autonomy granted by Colorado's constitution to its local governments was as follows:

The people of each city...of this state, having a population of two thousand inhabitants...are hereby vested with...the power to make, amend, add to or replace [their city] charter...which shall extend to all its local and municipal matters...Such charter and the ordinances made pursuant thereto...shall supersede, within the territorial limit and other jurisdiction of said city...any law of the state in conflict therewith...Such city...shall have the powers...necessary and proper for the government and administration of its local and municipal matters, [including] the creation of municipal officers, agencies...police courts...municipal courts...all matters pertaining to municipal elections...and the issuance, and liquidation of municipal [debt] obligations...²⁹⁸

The bounds of this local autonomy were subsequently clarified by the Colorado State Supreme Court, which stated that home rule independence should govern mat-

²⁹⁶ Tocqueville, *Democracy in America*, Part I, Chapter V, Section XII.

²⁹⁷ Inherent home rule was adopted by Michigan, Indiana, Iowa, Kentucky and Montana; the dalliances involved Texas, California, Nebraska, North Carolina, and Oklahoma. See generally, Reynolds, *Handbook of Local Government Law*, Chapter IV.

²⁹⁸ *Constitution of the State of Colorado*, Article XX, Section VI.

ters of local concern, but not of statewide concern or mixed concern, a determination derived from weighing four factors; first, whether the activity was traditionally governed by local governments; second, whether there is a need for statewide uniformity of regulation; third, the severity of impact upon persons outside the municipality; and fourth, the need for cooperation among governmental units in the state.²⁹⁹

This local independence contrasts starkly with the complete subordination of cities in some other states, where under the so-called "Dillon's Rule," municipal corporations "owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."³⁰⁰ Dillon's rule is the antithesis of micro-federalization, for it places the subdivisions of the state under the complete control of the central government, forsaking the separation of powers and decentralization which together give the micro-federal scheme its unique strength and stability.

We must, however, note that there is a natural limit to the utility of micro-federalism. Tyranny tends to reappear when political divisions become too small and the relative power of any individual actor is large in relation thereto, even if the unit is democratically structured. The mixed constitution is inherently more stable than the similarly sized monolithic entity at all levels of government, but especially at the local level, for the caprice of public officials grows intolerably obnoxious to the life of citizens as the political entity shrinks. It is for this reason that homeowners' associations are often unjust and tyrannical in their operations, although there are many more reasons besides.³⁰¹ It is the same principle, pushed to its extreme, that dooms pure Democracy. A final consideration regarding micro-federal structures is that they, like their member-state parents, should be harmonically balanced to the greatest extent possible, to preserve the benefits of the harmonic arrangement geographically within the member state.

THAT FEDERAL MEMBER GOVERNMENTS AND THEIR MICRO-FEDERAL PARTS SHOULD ALL BE HARMONIC, SO THAT THE HARMONIC ELEMENTS OF THE FEDERAL WHOLE ARE EQUALLY BALANCED WITHIN EACH PART AND SUB-PART

Federalizing a non-federal but harmonically proportionate state creates the potential for harmonic balance of the whole but uneven or incongruous dispersion of the harmonic elements among the parts. For example, a confederation of six equally populated states may be harmonically balanced in its federal constitution: half of the aggregate power possessed by the people, half by the government, one third by the aristocratic element, and one sixth by the monarchy, but it could still be the case that three states have only democratic power, and the others none at all. The overall proportion may still be harmonic, but the benefits of the harmonic arrangement would

²⁹⁹ *City and County of Denver v. State*, 788 P.2d 764 (Colo. 1990).

³⁰⁰ *Id.*, (Quoting from *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868)).

³⁰¹ See Generally the works of James Winokur.

never reach the member state citizens. This must be averted by making the members and their micro-federal parts harmonic in their own right. Thus, the whole, the parts, and the parts of the parts, will each be harmonically proportionate structures, forming a three-dimensional harmonic polity.

In non-federal governments, an harmonic constitution naturally yields its benefits equally to each district of the whole. However, in the case of a federation, even if the federal structure is harmonic, the member states and their subdivisions must be harmonic as well for the harmonic benefits of the whole to reach all parts. If some parts of the whole are not harmonic, then the harmonic class elements (the democratic, aristocratic, and monarchic elements,) whose balance graces the whole, will actually be geographically uneven and tyrannical within their territory. In this manner, what is mixed and balanced from the perspective of the whole will be overly democratic, aristocratic, or monarchic, as the case may be, in the various parts. When the harmonic class elements each predominate in different geographic locations, all matters of local discretion will be decided mainly by one element, inadequately checked by the others. For example, in a federation of three otherwise equal member states, the federal government may contain the most refined harmonic balance, with one member being democratic, one aristocratic, and one, monarchic. As to the whole, the harmonic proportion holds, but within each part, there is an unbalanced constitution and one element predominates. Thus, in federations, each member and its subdivisions must be harmonically balanced if the benefits of the harmonic government are to reach the smaller parts of the whole. This is a way of updating the principle that federations are strongest when each member is a mixed-government, in light of the discovery of the harmonic constitution.

THAT NATIONS SHOULD BE BUILT WITH EXPANSION IN MIND, A GOAL ADVANCED BY A BROAD AND EQUAL FEDERAL FRANCHISE

We must never forget that nations should be built with expansion in mind, for nations kept small, weak, or unable to expand when necessary become so feeble that they quickly fall victim to aggressors.³⁰² This requirement for growth was articulated by Sydney in his *Discourses*:

He that builds a city, and does not intend it should increase, commits as great an absurdity, as if he should desire his child might ever continue under the same weakness in which he is born. If it does not grow, it must pine and perish; for in this world nothing is permanent; that which does not grow better will grow worse.³⁰³

To this should be added the corollary that he who enjoys a supremely powerful state and does not intend that it should continue, commits an absurdity greater still, as if he should desire that his father might early dwindle into decrepitude and perish. If

³⁰² Machiavelli, *The Discourses*, Book I, Chapter VI. See Also, Plato, *Republic*, 373 D-E.

³⁰³ Sydney, *Discourses Concerning Government*, Chapter II, Section XXIII.

the state does not constantly endeavor to expand, it will invariably be unable to maintain even its status quo. Machiavelli agrees with this, for he states that:

It is impossible for a republic to remain long in the quiet enjoyment of her freedom within her limited confines; for even if she does not molest others, others will molest her, and from being thus molested will spring the desire and necessity of conquests...³⁰⁴

Thus, like the wise archer, the state must aim above its target in order to achieve its true aim. If preservation is the objective, increase must be the aim. Hence, the affairs of states must always be conducted with expansion in mind. Such expansion is a product of military preparedness, economic supremacy, and civil liberty; and for these reasons, the people are of paramount importance, for the *people* are the wellspring of all martial and material power, and liberty is the elixir which makes them effective. Machiavelli made this explicit equation:

Those who desire a city to achieve great empire must endeavor by all possible means to make her populous; for without an abundance of inhabitants it is impossible ever to make a city powerful. This may be done in two ways; either by attracting population by the advantages offered, or by compulsion...[But] to make conquered people subjects has ever been a source of weakness and of little profit, and when carried too far it has quickly proved ruinous to the conqueror...[Rome] created for herself many [confederate] associates throughout Italy, she granted to them in many respects an almost entire equality.³⁰⁵ Only those cities and countries that are free can achieve greatness...³⁰⁶

Such freedom proceeds from the ability of the democratic element to exercise its strength. This is done principally through consent, and thus, the breadth and equality of the franchise can be seen as a key ingredient to the public liberty upon which national power and greatness rest. In the federal context, equality of franchise means the political equality among and between the citizens of the member-states. The equality of federal citizens thus serves a dual purpose. First, it buttresses the stability of member-states by insuring healthy democratic elements in their harmonic constitutions, and second, it accommodates the federation's critical need for economic and physical expansion. The former consideration is specifically related to the need for member states to maintain an adequate ratio of Democracy within their own harmonic constitutions. The equality of the respective popular elements is clearly in need of such special protection, as they are the weakest elements of their constitutions and most easily subverted. Because the equality of privileges and immunities among all federal citizens strengthens the popular constitutional element, it stabilizes the federation.

Both objectives inure to the strength of the federation, a durable strength, economic in root, long-lasting, and objectified by a vast military might. This latter requirement is no ornament, no outmoded superfluity, no immoral feature of a federal

³⁰⁴ Machiavelli, *Discourses*, Book II, Chapter XIX.

³⁰⁵ Machiavelli, *Discourses*, Book II, Chapter IV.

³⁰⁶ Machiavelli, *Discourses*, Book II, Chapter II.

state. It must always be kept squarely in mind that a federal Republic will naturally attain wealth; that it will be viewed by its rivals through the political prism of greed, jealousy, and fear, and that its military defense will be a constant, critical priority.

THAT THE EQUALITY OF FRANCHISE AMONG FEDERAL CITIZENS DRAMATICALLY STRENGTHENS FEDERAL ECONOMY AND MILITARY SECURITY

A federation's power derives from the masses it unites. To optimize this power, the numbers, energies, and implements of these masses should be maximized. Coincidentally, all three objectives are met by creating an equal federal franchise. When all federal citizens enjoy equal political rights, the federal population increases through immigration and the enterprise and initiative of the people is stoked. The economy then expands and with it the military power of the state. In this way, the equal federal franchise boosts the power and stability of federations. The increase in power is not destabilizing since the whole is harmonically balanced and microfederalized.

The benefits of an equal franchise can be described in more detail by showing their effect upon the harmonic constitution. The democratic element's power is mainly exercised through consent, and its enjoyment of such both attracts people to the nation and motivates them to their highest potential. When consent is limited by the formation of political classes among the popular element, these incentives diminish proportionally and population as well as enthusiasm drains away, under the injustice born of inequality, the political juxtapositioning of impotence on some one hand and impunity on some other. Thus, when consent becomes a privilege of the few, the economic and military powers of the federation wane.

Machiavelli paints this picture clearly in *The Discourses*, where he compares the franchise policies of Venice, Sparta, and Rome. He explains that the Republic of Venice ruined itself by creating multiple classes of citizenry. Venice did not allow immigrants any share in the government and consequently two classes of citizens emerged, the original citizens who held political power and the late arrivals who had none. Venice found that such an arrangement was easy to administer so long as immigration was restrained and the original citizens could preserve their majority. But preserving this majority required avoiding population growth and territorial expansion. This shattered Venice's chance of attaining a national staying power commensurate with her financial prowess. Venice could attain wealth from trade but could never muster the military forces to defend that wealth or secure the borders. There were not enough voting citizens to fill the ranks of an army, and the subjects, being without a vote, had no special patriotism and accordingly made poor soldiers. Venice was left with money but no power to protect it; mercenary armies were Venice's only option, and these are the most useless forces known to warfare, likely to attack their employer as readily as his enemies, since his very need of them confirms their freedom to attack him with impunity and take his money without hazarding a battle. When shackled by these citizenship classes, Venice could neither expand in territory nor field the armies required to defend herself; accordingly, when she was

finally tested militarily, as eventually happens to every Republic, she lost everything in an afternoon.³⁰⁷ This demonstrates the danger of allowing political classes of citizens in a mixed constitution.

Machiavelli cites Sparta as a second example of the evils inherent in franchise restrictions. Sparta refused citizenship to immigrants and those it militarily subjected. Newcomers had no rights, being either slaves or powerless subjects. Over the years, the multitudes under Sparta's control swelled, but not her citizen population. Such a small citizenry made the government's administration convenient and stable, though great masses under Spartan sway had no share in her government. Upon this stability, Sparta came to dominate much of Greece, but found a defense of those possessions impracticable, as the Theban rebellion under Epaminondas and Pelopidas made clear.³⁰⁸ This inability to maintain and expand an even franchise lead ultimately to her loss of empire, economic wastage, and military decline.

Sparta began as a village in a river valley of the southern Peloponnesian peninsula. Founded by the warlike Dorians, it first conquered the other peoples of that valley. Those submitting peaceably became second-class citizens, *Perioikoi*, without political rights but free to follow their own economic pursuits subject to heavy taxes. Those whose resistance was trenchant, such as the inhabitants of Helos, were conquered and enslaved. As this class expanded, all such slaves were denominated *Helots*. Thus, Sparta had three classes, the original citizens of Sparta, the *Perioikoi*, and the *Helots*, or in other words, citizens, freedmen, and slaves.³⁰⁹ Under the Spartan constitution, the true citizens were strictly equal in all manner, and laws were devised to insure especially their economic equality by maintaining the poverty of individuals and the wealth of the state. They were subject to social austerity and a particularly militant education, giving Sparta more the appearance of an armed camp than a city. Sparta's constitutional arrangement was as follows. Two kings shared the regal power, but this was mainly limited to the command of armies in the field, the other executive, legislative and judicial functions being performed by five "Ephors" elected annually from the citizens, and an advisory body of aristocrats elected for life, known as the *Gerousia*, or 'senate.' Finally, some matters, such as declaring war, were reserved to the majority vote of the citizens in assembly. Thus, Spartan citizens possessed a species of mixed constitution, but stood dominant over the disenfranchised but economically free *Perioikoi* and the virtually enslaved *Helots*. Most importantly, citizenship was not extended to any persons brought within Spartan control by war. Such persons became either *Perioikoi* or *Helots*. New citizens could come only from sexual reproduction among old citizens, and even these could be demoted into the ranks of the *Perioikoi* for punishment. This unequal citizenship arrangement dictated Spartan foreign and domestic policy, and eventually doomed Sparta. Domestically, the small band of true citizens needed to train themselves into highly disciplined warriors in order to keep the numerous communities of *Perioikoi* and *Helots* under submission. This need generated the austere Spartan education and culture.

³⁰⁷ Machiavelli, *The Discourses*, Book I, Chapter VI.

³⁰⁸ Machiavelli, *The Discourses*, Book I, Chapter VI.

³⁰⁹ Duruy, *History Of Greece, From The Earliest Times To The Roman Conquest*, Volume I, Section II, Chapter VII, Subchapter II.

The success of Sparta in doing all this created opportunity for further conquest. Sparta thereby developed a finely disciplined army, augmented by auxiliary units composed of *Perioikoi*.³¹⁰

Sparta's few citizens formed a secure empire seated within their impregnable valley, and soon formed designs for expansion northward past the headwaters of the river they had dominated, westward over the mountains into the adjacent valleys of highly desirable agricultural land, known as Messenia, and eastward over the mountains to the Aegean sea. These campaigns were successful, and Sparta came to outright control over the bottom two-fifths of the Peloponnesus. Conquered peoples in these regions either fled or were enrolled as *Helots* or *Perioikoi*. The remainder of the peninsula fell strongly under Spartan sway. Sparta's ability to extend its control further was checked by the relative scarcity of true citizens in relation to the ever increasing masses of subjects. When Sparta emerged victorious over Athens in the thirty year Peloponnesian War, she did not have enough citizens left to administer and control the prize she had won. Battle losses and a failure to admit new citizens produced a nation that in its victory practically disappeared. But for her lack of citizens, all of Greece would have been united under Spartan authority. As it was, Sparta was constrained either to enact treaties which it could not seriously enforce, or install local oligarchs which it could little control and only weakly assist. Leadership of Greece slipped away from Sparta, Athens regained much strength, Thebes was able to dominate mainland Greek politics, and finally Macedon conquered all. In the end, Sparta was defeated by its own myopic policy of limiting citizenship to a small and static class.

In the waning days of Spartan history, just prior to Rome's domination of the region, Sparta's king Cleomenes realized and tried to remedy this national weakness. He quickly enrolled thousands of newcomers as full Spartan citizens. A brief surge of Spartan power resulted. The Achaean federation was gravely threatened and in the event prostituted itself to Macedon in exchange for military assistance. Macedon crushed the Spartans, who had learned the value of a large equal citizenry too late. Tragically, the Achaean Federation, which had always known the lesson, was nearly destroyed by the experience, and emerged from the contest a perverted federation under de-facto Macedonian control, ending Greece's greatest and last hope of liberty.

The Roman Republic, on the contrary, adopted the correct policy from the start, pursuing a vast expansion of the citizenry upon an equal franchise until well into the Republican period. This provided a great source of economic and military strength and formed the organic basis of Rome's power. While Rome obeyed this policy, she thrived. When it was abandoned, chaos and civil war broke out, destroying the Republic. As Livy relates, Rome began as little more than a hill with a name, but by policies of peace and war, gained population at an enormous rate. A sanctuary opened to receive the dregs and scoundrels of the neighboring lands filled Rome with men. They kidnapped wives from the neighboring tribes, and the women's tribes in turn joined Rome after their armies failed to avenge the kidnappings. All of these people were given the same legal status as the very first Roman masses. In fact, in the first thirty years, Rome received as new citizens not only the numerous vagrants and refugees drawn by the sanctuary, but also the defeated peoples of Caenina, Crustumium,

³¹⁰ Duruy, *History Of Greece, From The Earliest Times To The Roman Conquest*, Volume I, Section II, Chapter VII, Subchapter II.

Antemnae, Fidenae, and many Sabines in addition.³¹¹ The defeated enemy, the scoundrel, the vagrant, and the Roman-born citizens all shared similar rights and privileges, the only difference being the prerogatives reserved to the Roman nobles, and these were subject to constant erosion. This trend continued unabated for many hundreds of years, during which the equal enfranchisement of the newcomers enabled Rome to become the undisputed master of Italy.

This is not to say that Roman citizenry was without political classes; Rome was politically divided between the plebeians, the knights, the nobles and the patricians. But the equal franchise among the plebeians was the key to Roman success, for this was the popular element in Rome's constitution. Rome's massive popular enfranchisement provided a check upon the consular and senatorial power, forming a strong democratic element in their mixed constitution. Thus, one can understand the plebeians as forming the ever-expanding democratic element of Rome, and the remaining classes of knights, nobles and patricians, as the more static Aristocratic and Monarchic elements. Strictly speaking, the people were empowered by more than just their franchise, which was diluted by a weighting system that greatly favored the votes of the aristocratic element. The people possessed the Tribunes, officers dedicated to the cause of the people, capable of bringing the entire machinery of government to a halt and able to stymie the state's military efforts by blocking the levy of troops. Machiavelli speaks of these aspects of the popular power when he states that the disjunction of the Senate and the People was the source of Rome's power and freedom. The infighting and competition between the Senate and People, although seemingly a symptom of dysfunction, was actually the guarantor of her liberty.³¹² Though it kindled an ongoing agitation and was more difficult to manage than a pure constitution, such an arrangement supplied the checks and balances needed for some degree of constitutional justice as well as Rome's need for expansion and self-defense. Rome's example demonstrates how a large population with equal political power enhances the democratic element in a constitution.

After the war with Hannibal, however, Rome began to adopt a different citizenship policy and only reluctantly extended citizenship to those it had subdued. From that time, the boot of Italy became a Rome-dominated patchwork of allies built around a core of Roman citizen-communities and quasi-citizen 'latin rights' communities in central Italy. Each ally became a member of the Roman federation, retaining a great deal of autonomy in the management of domestic matters, yet without Roman citizenship and its vote. They were bound to obey Rome in military and international matters without consent. This enabled Roman Aristocrats to control the region and marshal enormous military resources without having to yield power to an expanding popular element. To insure this control, the rights and privileges of each community differed widely, guaranteeing that jealousy and pride would keep them mutually agitated and disinclined to a united challenge to Roman authority. Within a hundred years, this arrangement exploded in Rome's face. Roman power and arrogance began to oppress the allied communities, who in turn sought Roman citizenship and the rights and redress available therewith. These were refused, and the allies rose up in a bitter and devastating civil war. These peoples were fighting not to be free of Rome,

³¹¹ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapters VIII-XI.

³¹² Machiavelli, *The Discourses*, Book I, Chapter IV.

but to be an equal part of it. They sought the equality of franchise which would strengthen both themselves and Rome. After winning the war, Rome belatedly extended citizenship to them but rendered it nearly useless by impracticable registration procedures and gerrymandering the voting power of the new citizens.

Rome abandoned a truly equal franchise from this point forward, and making matters worse, Roman military success had acquired an Empire of subject states beyond Italy, peopled by alien races. Not only were these new acquisitions denied citizenship, even the watered-down citizenship of the Italian allies, they were reduced to complete servitude. Many were enslaved directly and imported to Rome. Those remaining were made subject to the appalling tyranny of arbitrary Roman Governors and extortionate tax-collectors. These people truly lived in a state of tyranny, without votes, without rights, governed not for their own benefit but for that of the Governors and Rome. This was the end of the equal citizenship which had raised Rome from an obscure village to the mistress of the World. The civil war of the Italian allies and the creation of provincial rule by appointive Governors spelled the end of the Roman Republic and mark the beginnings of Imperial Rome.

Many will argue that political classes within the popular element may aid the projects of national defense and economy. They may note, for example, that nations which foster a military caste have historically been able to defend themselves and maintain their culture for impressive periods of time. Japan stands out as a principle example. Indeed, classes and castes may aid monarchies, where they introduce a fractal, but they ruin mixed constitutions, and they are fatal to federations. Rise and fall of Athenian power illustrates this point. Equal citizenship and open immigration policies generated enormous Athenian power. The creation of citizen classes destroyed it.

Athens began as an unpromising town in a barren, rocky valley in Eastern Greece's Attic peninsula. When the Dorian tribes, who would go on to found Sparta, first appeared out of the north and began their waves of migration and pillage into central and southern Greece, they frankly considered Attica too worthless to occupy and settle. Thereafter, successive waves of Dorian invasions drove countless refugees into this corner of Greece, and Athens welcomed them with open arms. It became an asylum for more than two centuries, its enmity with Sparta being watered by every Dorian-hating newcomer. The population soared and Athens became powerful. The territory was blessed by a small share of all things with nothing in abundance. Mountains, vistas, plains, ports and coastline were each present, but scarcity was constant and imposed on the Athenians the need to manufacture, trade, innovate, sail, and cultivate their wits and intellect. The exact opposite of Sparta, barren Athens was enclosed on three sides by the sea, inviting her to a maritime lifestyle, whereas Sparta had a lush valley enclosed on three sides with towering peaks, snow-capped even in summer. Also unlike Sparta, Athens' newcomers were enrolled as equal citizens. Although the polity was torn by factions, with the democrats in the mountains, monarchists in the plains, and merchant and aristocrats along the coasts, the newly arrived citizen was as free as the old to participate as they found advantageous.³¹³

Theseus unified Attica under Athenian control and formed an aristocratic government atop the Acropolis. The harsh laws of the era were immortalized by the draftsman Draco, and though they gratefully fell into desuetude, the fixity of written

³¹³ Yet another example of Montesquieu's ubiquitous 'spirit' of the laws.

law was the legacy. Solon, a rich and well-traveled merchant with wide experience was elected to recover the island of Salamis, ill-gotten by the neighboring city of Megara, which he did in 604 B.C. His moderation and success earned him the confidence of all. He was asked to design a new constitution, pleasing to all parties. He established a mixed constitution with a senate and popular assembly, cancelled debts, freeing many slaves thereby, and repurchased and brought home those Athenians sold into debt slavery abroad. He redistributed land, confirmed free immigration, guaranteed private property, introduced standard weights and measures, and most critically, *gave uniform laws to the people of all classes*, planting thus the seed of democracy in the Athenian heart.

Political gyrations at length yielded to the Tyranny of the Pissistratus, which obtained power upon the shoulders of popular trust. This infamous government built roads, public buildings, printed the first editions of Homer, and implemented some types of relief for the poor. Nevertheless, the tyrant's sons were as usual cruel. They were assassinated at length and the Tyranny was replaced by the glorious Democracy, whose legacy still echoes in the annals of human history. The heroic Klisthenes organized the Democracy, while the aristocrats of the city begged Sparta for help in establishing an oligarchy. Spartan soldiers arrived but their siege was broken by Klisthenes and his democratic army. Euphoric and emboldened, the Athenian army went on to seize Chalcis and Euboea, the latter to be her granary and safe-deposit box for centuries. Without doubt, Athens was shining brilliantly under Democracy.

In the sixth century B.C., the Persians conquered Asia Minor. When the cities of Ionia rebelled, many Greeks, and significantly the Athens, aided them, but to no avail. Persia re-conquered the Ionians. Angered by the assistance Greece had provided the Ionians, Persia determined to punish the Greek states with a military invasion. It came in 590 B.C. Persian soldiers rode mercilessly over northern and central Greece, and Persian naval squadrons conquered the islands of the Aegean Sea. Athens asked Sparta for help in repelling the barbarians, but Spartan reactions were at first equivocal and much delayed. Sparta longed to see Athens destroyed by the Persians, and gambled on being able to resist the hordes alone at the isthmus of the Peloponnesus. Athens thus faced the Persian army of 100,000 soldiers alone with her few allies, comprising no more than 12,000 men. Outnumbered ten to one, Athens met the Persians at Marathon, a day's march from Athens itself. Miltiades led the Athenians, with the generals Themistocles and Aristedes commanding wings. Beyond all expectations, the Persians were utterly smashed by an Athenian feigned retreat and surprise double-envelopment. In an afternoon, Athens had saved all of Greece single-handedly, at odds of ten to one against. A belated Spartan army arrived three days later, in time only to look with shock on the unimaginable glory Athens had garnered. Miltiades, Aristedes and Themistocles were enshrined forever in the halls of military fame.

The Persians were not finished, however. They organized a second invasion under Xerxes, to avenge the first. It came ten years after Marathon. In the meantime, Themistocles had proposed and implemented the famous maritime strategy for Athens, wherein Athens would one day build long walls to the Piraeus port, and survive by command of the sea, using the long walls like a windpipe through which to breathe in case of land invasion. Supply and counter-attack alike could be accomplished by naval supremacy. To that end, Athens formed the Piraeus harbor into a naval station, and constructed 200 trireme warships. The construction of defensive walls, however, would have to wait.

When Xerxes' new Persian hordes arrived at last, most Greek states attempted no resistance. Athens and Sparta set aside differences in the face of the common threat. The Persians entered and devastated Attica. Athens, under Themistocles' leadership, evacuated the city by ship to the island of Salamis, where the entire Athenian population awaited a chance to retake their homeland. The Persians destroyed the abandoned city but could do little else. All that was left of Athenian power was the navy and the multitudes of citizens encamped on Salamis. Sparta, instead of assisting Athens, performed the cowardly double-cross of building a defensive wall across the isthmus at Corinth, hoping yet again to see Athens destroyed.

An enormous Persian fleet of over 1000 warships plied into the waters of Eastern Greece, purposing to finish off Athens. Two severe storms, however, destroyed three-quarters of this fleet in separate incidents, reducing it to a size more equal to the Athenian. The Athenian navy then used the narrow straits and inlets between the mainland and Salamis to draw the Persians into a type of ambushade. The Persian fleet was destroyed, and Athens attained a victory more glorious, if possible, than even that of Marathon, again almost single-handedly. The Persians evacuated a large portion of their troops from Greece, and the Athenians returned to rebuild Athens.

But the Persians still had a considerable army in central Greece to be dealt with. A force of 300 Spartans seized the defile at Thermopolye and died to the man delaying the Persian army's return into Boiotia. This force, under Leonidas, gave Sparta a thin claim to having indeed helped Athens defeat the Persians. Sparta, Athens, and Plataea fielded a combined force which finally defeated the Persians and sent them out of Greece for good. During the battle, Athens again proved itself braver and more enterprising than the Spartan elements, which were terrified to succor the Plataean wing when it was threatened during the fighting.

After the retreat of the Persians, Themistocles put the finishing touches on his plan to build Athenian power on a maritime strategy. Athens furiously rebuilt its city walls, though the Persians had destroyed most of the dwellings. Meanwhile, Themistocles himself went to Sparta, which intended to obstruct the wall construction, and wove webs of deception and delay until the walls were at last ready. Themistocles then announced to the outwitted Spartans that the walls were complete, and that henceforth, Athens was to be dealt with as an equal with full awareness of its own interests. Soon thereafter, the 'long walls' were built connecting Athens to the Piraeus port, creating a wind pipe through which Athens could supply itself indefinitely, and set at defiance any besieging land force indefinitely. In this way, Athens could grow its navy and thereby not only protect itself, but bring the surrounding areas under its influence.

Athens was about to enter its period of greatest glory. It had saved Greece twice from the Persians, largely by its own efforts and bravery. It was free, had equal citizenship, easy immigration, brisk commerce, rule of law, and an enterprising spirit unmatched in Greece. The Greek islands of the Aegean were tired of Persian invasion, and over 200 of them entered into an Alliance with Athens for protection. Thus arose the unforgettable Delian League.

The Delian League, Athens' famous confederation, upon whose shoulders she rode to a temporary but unforgettable glory in the fifth century B.C., began as a pure confederation but rotted from the moment Athens revoked her equal enfranchisement policy and converted the league into an imperial apparatus. The league originally tried to form under Spartan organization, but the Spartans were so offensive to the islanders that Athens was asked to organize it instead. The League was one of consensual

allegiance, each member contributing either money or material to the defense of all, as implemented by Athens. But at length, Naxos tried to secede from the league. Athens militarily forced them to remain, and the league was gradually exposed as nothing more than an imperial instrument of Athens. Then, critically, after an enlightened open-door policy which had strengthened her since before the time of Solon, Athens limited its citizenship to descendants of Athenian parents on both sides, denying in a stroke the mutual aspirations of League members to citizenship in the one nation which principally benefited from the imperial confederation.³¹⁴ With this policy, honor was stripped from sacrifice, luxury from labor, status from merit; the benefits of confederation were diminished, and the Delian League remained intact by armed persuasion, becoming a perverted federation. It would not survive the Peloponnesian War, in which Sparta finally defeated and occupied Athens. Had the league remained one of equal citizens, the result would have been different.

Many look to Athens' indomitable spirit and courage to explain her success, and blame military blunders for her downfall. However, it is clear that her success came from equal citizenship classes and her downfall from the reduction of Delian league members to the status of subjects. The spiraling disintegration of the Athenian empire which followed stands in stark contrast to the invincible allegiance of the Roman allies during Hannibal's ten-year military terrorization of the boot of Italy during the second Punic war. Rome's early policy of extending citizenship, although sometimes incomplete and delayed, paid off in global dividends. Athens' myopic selfishness scuttled her empire.

Thus, it is clear that when all federal citizens enjoy equal political participatory rights, the federal population increases and the enterprise and initiative of the people is stoked. The economy and military power of the state are accordingly augmented, and this boosts the power and stability of federations. When citizen equality is destroyed, however, federal power recedes and the state is dramatically weakened.

THAT MAINTENANCE OF THE SEPARATION OF POWERS IN AND AMONG FEDERAL MEMBERS IS THE ACTUAL POLICY REASON AGAINST DEGREES AND CLASSES OF CITIZENSHIP IN FEDERATIONS

The Respondent demands that it believes strongly in equal federal citizenship. We concede this, but Respondent has not fully understood the deeper reasons why such belief is correct. A brief look at American case-law makes this clear. The United States Supreme Court touched upon the requirement of 'equal federal citizenship' in *Zobel v. Williams*, striking down Alaska's plan to redistribute state monies in proportion to the residency tenure of citizens. There, Justice Brennan stated that such a scheme was "inconsistent with the federal structure...[which]...does not allow for, degrees of citizenship..."³¹⁵ The court held that such degrees of citizenship would impermissibly violate the constitutional right of interstate travel. They implied the final term of the syllogism, which resulted in the following; citizenship classes im-

³¹⁴ 451 B.C. Burn, *The Pelican History of Greece*, Chapter X, Section II.

³¹⁵ *Zobel v. Williams*, 457 U.S. 55 (1982).

pede interstate travel, impediments to interstate travel injure federalism, thus citizenship classes injure federalism.

Zobel was ultimately decided on equal protection grounds. But, the danger to federations arising from citizenship classes is addressed elsewhere in the constitution, notably in the privileges and immunities clauses, as we just noted, and in the Fourteenth Amendment's due process and citizenship clauses. The court's error was to ignore the greater truth, that the maintenance of *the separation of powers* in and among federal members is the actual policy reason against degrees and classes of citizenship in federations.

The equality of federal citizens also strengthens the economic health of the federation, and it is for this reason that the United States Supreme Court often addresses the issue of unconstitutional citizenship classes under the rubric of the dormant commerce clause (a doctrine which American courts use to strike down state laws which invade the sphere of commercial regulation reserved to the federal government, even when no federal law has been passed in the disputed area.) Citizenship classes interfere with the free flow of productive elements among member-states. When statutes hamper the element of labor, the court has a choice of doctrine, for it may rely upon either the dormant commerce clause or freedom of transportation grounds to invalidate them. The doctrinal applications often turn on the phraseology of the law in question, but they all aim at the identical evil, namely, citizenship classes, which both impede the economic health and hinder the structural stability of federations. Still, the court should instead decide such issues on separation of powers grounds.

The United States Supreme Court came face to face with these exact dangers to confederation, without putting its finger on the separation of powers, when it reviewed statutes tending to deny the franchise to state citizens. The court wisely struck these laws down, but on grounds far more vague than federalism concerns. For instance, in *Harper v. Virginia State Board of Elections*, the court invalidated a modest state poll tax on voting age residents.³¹⁶ Resorting as usual to an equal protection rationale, the court held that "Voter qualifications have no relation to wealth," and thus, they treat similarly situated classes of people unequally, in violation of the 14th Amendment's equal protection requirement. The court's reasoning is sound in regard to the equal protection violations of these laws, but it misses the cardinal danger present in citizen classifications; the fundamental principle of the constitution which they offend is not equal protection, but rather, federalism. The court vaguely hints at such a danger when it notes that the right to vote is "preservative of the other basic civil and political rights," and forms "a fundamental right in a free society." Notice, the 'free society' they refer to is a group of mixed constitutions united under a federal umbrella; and franchise restrictions are incompatible therewith because they unbalance those mixed constitutions and destabilize the federation. Hence, it is more truly a federalism concern that renders poll taxes unconstitutional. Yet the court, missing this point, is forced to apply its catch-all equal protection analysis instead, failing to acknowledge the connection between citizen classifications and the constitution's adoption of a federalist structure. We will explore the Respondent's equal protection jurisprudence later, however.

The court even stated that "the equal protection clause is not shackled to the political theory of a particular era." The court's failure to see how equal

³¹⁶ *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079.

enfranchisement safeguards the popular element in the mixed constitution, a principle confirmed by over two thousand years of political thought, is astonishing. Ignoring this, the court places its justification of equality upon an equal protection basis, and again avails itself of the indiscriminate power to interpret the constitution in any manner it chooses, as afforded by its 'new' equal protection doctrine.

Justice Black's dissent notes this shortcoming, saying "There is no more constitutional support for this court to use [equal protection than to use due process] to write into the constitution notions of what it thinks is good governmental policy." The court thinks 'equal federal citizenship' is indeed good governmental policy, but as Black notes, it has trouble finding the correct constitutional doctrines which mandate it. A review of the nature of confederations would lead the court to a stronger understanding of the manner in which the harmonic separation of powers, and especially its *federalism* component, intrinsically mandates equality of citizenship among the member-states and answers the riddle presented in cases like *Harper*.

THAT GENOCIDE INVARIABLY DIMINISHES NATIONAL POWER BY INTRODUCING CITIZENSHIP CLASSES, REDUCING FEDERAL POPULATION, AND INCREASING THE OPPRESSIVE FORCE OF MAJORITY FACTIONS

Respondent claims that it upholds citizen equality and is therefore just in this regard. Petitioner asserts, however, that Respondent has usually observed such equality only among its Anglo-Saxon citizens. In support thereof, Petitioner presents the evidence of Black slavery and the destruction of the Native American "Indians."

In defense, Respondent asserts that the legacy of slavery was an unfortunate feature of North America before the United States existed, and that this injustice was finally extinguished in an arduous civil war which it fought in order to rid itself of slavery. Respondent also states that although the racist residue of the black slave era was hard to expunge, the efforts of the 1960's civil rights movement and contemporaneous federal government legislation made great progress in eliminating it. Moreover, the Respondent contends that it is still striving to bring equality to its black citizens, a task it sees as a major priority. Regarding the Native Americans, or "Indians", Respondent contends that the destruction Petitioner alleges is exaggerated and that in the event, the result was for the good of the world.

We agree with Respondent's summary of its struggle with black slavery, but as for the destruction of the American Indians, Respondent is wrong in every particular, violating not only moral maxims, but the particulars of just government and the national strength it brings.

The Respondent dealt with the American Indians in a manner totally adverse to the principles of just and powerful government. The Indians were not incorporated into the American edifice through fractal methods. Instead, they were annihilated. The shards that remain of them are still anomalous political fragments, not partaking of the fractal structure of harmonic federation. It is conceivable that they could have become members of the American federation through the procedures set forth in the Northwest Ordinance. One can imagine the states of Ute, Cheyenne, Arapaho, and so

forth. The United States was in a position to extract such concessions as would have made these states conform to the Federal-State structure and support its jurisprudence. Instead, Respondent read them out of its constitution and ran them out of their lands. Those who were not killed outright were forced to accept payments and migrate into reservations, usually pitiless deserts, where they could not provide for themselves. This enabled government agents to sell them provisions at extortionate prices and collect payment out of treaty funds directly from the government. The Indians thus received practically nothing. Agents monopolizing Reservation sales obtained all the Indian money, and the few goods Indians received in return were of miserable quality and ridiculously over-priced. Meanwhile, the Indians led a pathetic existence where most starved or died of disease. American policies decimated their populations; alcoholism and despair eventually killed many of those unlucky enough to survive. This was a simple policy of genocide.

Respondent insists that this was not genocide, claiming that the Nazi destruction of the Jews was actually genocide, not the American destruction of its Indians. We find that they were opposite types of genocide, the German variety being supply-side, the American, demand-side. Germany used its victims as labor in a process designed to destroy them eventually. Thus arose labor camps, epitomized by the sadistically ironic slogan appearing over the gates of one such camp which read, "Work makes you free." The American genocide did not use a labor process for killing its victims. It rather used a consumption process where the victims were locked in a demand camp, forced to do no labor but rather to buy and consume in a process designed to kill them off eventually. This differed from the German system only in the place the victims occupied in the market process. In Germany, they were part of the supply side, down to their hair and hides. In America, they were part of the demand side.

Respondent insists that if such is true, then the American method was by far the kinder and more humane, and we should mitigate our judgment accordingly. We refuse however, to rule on what methods of genocide are kinder. Moreover, we hold that there can be no possible mitigation for a kinder performance an inherently unjust act. Respondent's genocide will be judged from its results, not the means. Its results were a violation of justice, especially as judged by the harmonic federal ideal and the structures of rights upon which such depends, to say nothing of more basic human rights.

We do find, however, that Respondent has recently made progress in its treatment of those few Indians remaining. We are most especially relieved to note that the Indian tribes have been brought within the coverage of the 1st and 14th Amendments by the Indian Civil Rights Act of 1968. This guarantees to them the freedoms of speech, religion, and association; and the other freedoms of the bill of rights, along with the ideals of equal protection and due process. Other legislation has also given the tribes the same economic status as states for the purposes of issuing bonds. These are dramatic steps toward bringing the Indian tribes within the fractal of the Federal American constitution. They are indeed more like member-states of the Federal union than before, and this promotes a great degree of justice with respect to the Indians, their tribal governments, the other member-states and the non-Indian citizens of America. It is almost as if the Respondent has recognized that its fractal constitutional format can accommodate the Indian way of life as it could any other minority faction.

We would have hoped, however, that the United States could have accomplished this without resorting yet again to a racial classification, in defining who is legally an Indian.

We must also address Respondent's comment that its overall treatment of the Indians has turned out to be for the "good of the world." First, we firmly denounce in every respect the Respondent's Indian genocide. Still, we recognize that, as history has made clear, the advent of the United States to superpower status has halted or prevented many genocides and sufferings around the globe. We are delighted that Nazi Germany was destroyed and its genocidal nightmare brought to a close. Without the United States operating at its 1940's size and strength, we doubt this could have been done, and we believe that the reverse conquest would have in fact occurred. In that event, the United States would have been destroyed, and its peoples exterminated, Indians and all, and it would have been replaced by the most bloodstained tyranny in the history of human crime. We are equally relieved that Imperial Japan was destroyed. Their brutalities, rape, and genocide within all of their occupied areas, combined with their demented militarist oligarchy were as threatening a pestilence to justice as were the actions of the Nazis. Suppression of Imperial Soviet Communism was also a service to justice, insofar as that suppression itself was not carried out unjustly. The global triumph of Communist Russia would have been as unjust as that of either Imperial Japan or Nazi Germany. The United States is owed some measure of thanks for these actions. It is, to a small extent, responsible for the rise of these threats, too. We believe, however, that on the whole the Respondent's role in these events was extremely beneficial to the cause of justice.

We are willing to concede that without the United States' occupation of Indian lands, it could not have played the decisive role in the destruction of the Nazis, Soviets, or Japanese that it did. We are also certain that the Indians, if left alone, would not have been strong or organized enough to accomplish the above suppression of injustice. We are not willing to say, however, that this necessitated the genocide of the Indians. Had the Indians been *included* in the American system as federal member-states, America would have been far stronger than it actually became, as the lives and energies of millions of people would not have been pointlessly and shamefully squandered.

Moreover, we are unwilling to assume that the remainder of history would have progressed unchanged had the Indians been left alone to enjoy their lands. History from Napoleon onward would have been utterly transformed into an inscrutable mystery. Hence, we cannot assume that the Nazi's, Soviets, or Imperial Japanese would even have existed had the Indians been left alone. We cannot, therefore, agree that the American treatment of the Indians was for the "good of the world, in the event," because we cannot compare a real course of history with an unknowable course that was avoided. All we can do in this regard is hazard a guess. In this respect, we point out the universal political principles which always obtain. The Indian tribes were neolithic, elective monarchies and aristocracies. A few were mixtures of these. They had no harmonic constitutions, and with very few exceptions, no federations. Their political weakness and demise can be forecast to some extent by these hints. America, for its part, violated its fractal structure and squandered millions of potential citizens' lives. Its reduction in strength is the calculable result. This is all we can estimate, and it does not excuse even in part the Respondent's Indian genocide. It was bad for America in the event, and bad for the Indians in the event. As for the rest of the

world, we do not believe that worse parts produce a better whole. Logically, then, it was bad for the world, as well.

THAT FEDERAL MEMBER-STATES CAN BE SAFELY ORGANIZED AS ‘STATES-AT-LARGE,’ OR ‘VIRTUAL STATES’ WITH NO TERRITORIAL BASIS OF EXISTENCE

Respondent insists that the land-use struggles between its pioneers and Indians were so severe that no ‘Indian states’ within the United States could have been created as a practical matter. Instead, according to Respondent, whatever land it gave to such entities would have been encroached upon and swallowed up by non-Indians, who would eventually provoke the Indians into retaliation and then importune the Federal government to rescue them militarily from their self-made predicament. We appreciate the candor of Respondent in admitting this likelihood. Nevertheless, it is a false assumption that any state, Indian or otherwise, need have physical territory. It must have citizens, but all else is extraneous. Their rights need not be tied to any specific lands.

If a federation of member states decides to permit the formation of States at large, states without territory, then all that need be done is provide that their citizens be able to reside in any physical member state, but be subject to the laws of their state at large. So long as no difference in political rights or power is tolerated between these citizens and those of physical states, than the existence of virtual states does not upset or injure the fabric of a Federation, except as they may increase the number of members beyond an optimum point. Virtual states are dangerous, however, in that they threaten to become mere citizen classes.

Such virtual states, so long as kept politically equal to other states, would provide a dynamic force in the legislative branch, as they would have Senators and Representatives beholden to the votes of persons not tied to any land in particular. Such states would then function as factions in waiting, and their political character would shift with membership and popularity. As occupants of the state emigrated and migrated freely between territorial and virtual states, the political attitude and influence of the virtuals would swing in the direction of its majority, and then swing back as membership changed into some other majority. It would be a prefabricated vehicle for political expression, awaiting merely the influx of citizens in order to assume its political attitude. We therefore hold that Indian states could have been formed, albeit as virtual states. Since this idea had no currency at that time, however, we will not unduly censure Respondent for failing to create such states.

THAT ARTIFICIALLY DIFFERENT MENTAL CAPACITIES CREATE CITIZEN CLASSES AND INJURE THE DEMOCRATIC ELEMENT.

Respondent’s ally, The Confederate Republic of Germany, now enters this argument on Respondent’s behalf, and argues in *amicus* that Respondent’s planned execution of Petitioner is an anti-incest policy, a breeding policy as defensible as any anti-cloning policy. Germany reminds the court that Petitioner’s father killed his fa-

ther and copulated with his own mother, producing four children, the two brothers who slew each other herein, and two sisters, one of whom is the Petitioner herein. According to Germany, executing people like Petitioner serves the interests of justice, since the tolerance of incestuous offspring would result in high incidences of retardation, a weakened democratic element and ultimately an unbalanced harmonic constitution. Respondent has disclaimed this defense and begs us to ignore it.

We disagree with Respondent's ally for the following reasons. Preventative anti-incest laws may be defensible along the lines Germany suggests, but not remedial executions. This court will not sanction the conversion of a physiological status into a crime. There is no such thing as gene crime. Attempts to prevent the occurrence of incestuous offspring may physically strengthen the democratic element. But once such offspring are born, they must be accorded the same legal status as all others. Failure to do so will create citizenship classes and gravely harm the democratic element by creating within it stark echelons of hierarchy which destroy its ability to counterbalance the aristocratic and monarchic elements. Such hierarchies actually convert the democratic element into part of the aristocratic and thereby destroy the harmonic constitutional balance.

On Germany's behalf, we are willing to agree that anti-incest laws are prototype anti-cloning measures. Moreover, we agree that preventative and universal anti-cloning measures generally thwart citizen-classes and promote equality within the democratic element. Cloning differs from incestuous reproduction in an important respect, however, which forces us to handle it differently. Incest yields weakened offspring. Cloning, however, can produce *strengthened* offspring. This is true for all other forms of genetic manipulation. Therefore, preventing cloning maintains citizen equality by preventing the emergence of stronger, not weaker citizens.

Knowing human nature, genetic enhancements will occur, and they will be of two kinds, aesthetic and intellectual. Aesthetic enhancements are politically relevant insofar as they create sexual power and brute muscular strength. Intellectual enhancements are far more politically powerful. Compared to the mind, the construction of the remainder of the body is almost politically irrelevant. The brain and its enzymes are the decisive part. They are extraordinarily aristocratic. For the same reason, freedom of thought and compulsory minimum education are necessary to minimize the aristocratic effects of intellectual differentials among the citizens. Intellectual enhancements inevitably create a severe class hierarchy among citizens, be it legally recognized or not.

Human nature is somewhat averse to incest as a rule, but it will be uncontrollably interested in genetic manipulation, since this goes hand in hand with humanity's instinctive drive for self-maximization. Therefore, unlike incest, cloning and genetic manipulation will happen frequently, regardless of any government's effort to prevent it. Moreover, it will often happen at an accelerated rate owing to some governments' outright encouragement. In such cases, the democratic elements will likely become unbalanced, but the overall power of such states might nevertheless be temporarily increased in absolute terms, unbalanced constitution notwithstanding, owing to the intellectual prowess of its citizens. Thus, there is an international and military dimension to gene manipulation which goes far beyond its destabilizing effects on the democratic element. It can destabilize the international balance of powers.

For this reason, cloning and gene manipulation must be handled such that, so long as none occurs anywhere, it is banned. But once it arrives anywhere, it must im-

mediately become available everywhere and in the same way to everyone. This will strengthen not only the equality of the democratic element, but will safeguard the equality of nations with respect to one another. Since we anticipate cloning and gene manipulation to become the norm due to human nature, we must remind that the resulting species will still be sentient beings and will fit into the harmonic federal system like any others. To the extent that insurmountable differences arise, the aristocratic and democratic elements must be likewise adjusted to compensate and maintain the balance of powers among the harmonic elements. We do not foresee political difficulties for *homo-sapiens* from the advent of *homo-differensis*, so long as the lessons regarding the federal harmonic constitution are kept in mind and the protections for minorities and factions inherent in the harmonic federal system are kept in place. Under the federal harmonic constitutions of the future, *homo-sapiens* will be a minority faction and should be safe as such. If just political conditions exist, the descendants of *homo-sapiens* will live hundreds of years and reach the stars.

For these reasons, we find cloning and gene laws to be inherently different from incest laws. The latter can be banned without negative political consequence. The former, however, cannot be banned for long, and must ultimately be universally permitted and facilitated for justice to supervene. And in neither case can offspring be eliminated once born. They must be politically equal citizens and take their place as minority factions within the federal harmonic system. Hence, we overrule Germany's attempted defense of Respondent. Executing Petitioner is an improper way to implement anti-incest rules, and incest is so different in its effects from cloning that laws governing one cannot govern the other.

THAT ECONOMICALLY GENERATED CITIZENSHIP CLASSES ARE IMPOSSIBLE TO ELIMINATE BUT SIMPLE TO COUNTERACT.

Respondent alleges that capitalism guarantees political classes, since all citizens more or less politically powerful as they are wealthy. They further state that although 'equality before the law' can be striven for in legislation and jurisprudence, there is no way to eliminate the political influence of wealth, for it will always afford its holder a louder voice and a more respectable image than poverty, and thus the rich will always be politically stronger than the poor, whatever the laws and whatever the constitution. Respondent thus demands that we recognize the impossibility of a purely equal federal franchise, since political classes will naturally rise from the effects of capitalism.

We neither attack nor defend here the proposition that political citizen classes are the inevitable result of economic differentials among private citizens. However, if political classes do arise from accumulations of wealth, they are very simply counteracted, as Twain demonstrated in his essay *The Curious Republic of Gondour*:

...[Gondour] had first tried universal suffrage pure and simple, but had thrown that form aside because the result was not satisfactory. It had seemed to deliver all power into the hands of the ignorant...A remedy was sought...The new law was framed and passed. Under it every citizen, howsoever poor or ignorant, possessed one vote, so universal suffrage still reigned; but if a man possessed a good common-school education

and no money, he had two votes; a high-school education gave him four; if he had property likewise, to the value of 3,000 *sacos*, he wielded one more vote; for every 50,000 *sacos* a man added to his property, he was entitled to another vote; a university education entitled a man to nine votes, even though he owned no property...³¹⁷

Twain's imaginary Republic sought to give non-financial merits an offsetting political power against economically derived voting power. Twain's method of achieving this counterbalance was to abandon an equal franchise in favor of a weighted one based on calculations of merit. We are not specifically advocating Twain's system, as the actual calculations would be too difficult for practical use and also dangerously susceptible to aristocratic manipulation. We merely seek to demonstrate to Respondent that the political power derived from money can be offset if need be, and thus we do not necessarily accept Respondent's argument that political classes unavoidably accompany financial inequality.

THAT THE FAMILY IS THE SMALLEST POLITICAL STRUCTURE SUSCEPTIBLE TO FEDERATION.

Respondent now objects that our entire inquiry into constitutions and political systems is actually irrelevant since Petitioner was punished under a law essentially regulating a family dispute between two particular brothers, and that family regulations are not political issues and have no constitutional dimension. Petitioner counters that even if such were true, Respondent's family law is intrinsically unjust. We disagree with Respondent but also find the petitioner's claim somewhat problematic.

We are keenly aware of the family aspects of the rules and conduct underlying this case. We understand that Petitioner is under a death sentence for burying her brother, who himself died at the hands of another brother. Ignoring for the moment the Respondent's inadvertent admission here that their law is essentially a bill of attainder, the Respondent is nevertheless incorrect in arguing that the family is non-political. While tracing federalism to smaller and smaller political structures, we must note the dominantly political function of the family as an institution and identify its role in a federal scheme.

The family is the penultimate political building block. Only the individual is more basic. As a political structure, the family involves the same issues of justice as do larger political structures. As a political system, it is susceptible to a separation of powers and to tyranny. It can be a dungeon of injustice no less than can a corrupt county court and its jail or a tyrant's bloodstained kingdom. It forms an essential component of the larger political systems into which it fits, and its shape and nature profoundly affect the whole. Aristotle notes this intrinsically political nature of the family early in the *Politics*:

...those which are incapable of existing without each other must unite as a pair...This association of persons, established by nature for the satisfaction of daily needs according to nature, is the household...The

³¹⁷ Twain (Clemens), *The Curious Republic of Gondour*, from *The Annals Of America*, Vol. X, Selection LXXVIII. (Originally printed in the *Atlantic Monthly*, October, 1875.)

next stage is the village, the first association of a number of houses... The final association formed of several villages, is the state. Therefore, every state exists by nature, as the earlier associations, too, were natural.³¹⁸

The family is thus by nature the smallest political association within the state. Its 'constitutional' structure can be analogized to the larger entity. Families are usually aristocratic or oligarchic in structure: gerontocratic, if ruled by the old, plutocratic, if by the rich, or patriarchal if by the men, and matriarchal if by the women. In a few cases they are anarchic; in the rarest cases, they are purely democratic, i.e., each member leads selflessly on behalf of the others.

Petitioner alleges that the family structure dictated by Respondent's family law is unjust, as it disparages the property rights of the parties and thereby impairs the social capitalism upon which the safety and welfare of the entire constitution depends. Despite the theoretical rarity of the democratic family and the prevalence of the patriarchal, plutocratic and gerontocratic family, we note that the Respondent's laws presume that all families are purely democratic. This democratic assumption is applied to most issues of property and rights whenever the Respondent's courts decide family issues, including marriage, separation, annulment, divorce, division of property, alimony, maintenance, child support and custody. Most of respondent's state courts, for these are the ones which hear family issues, do not permit considerations of aristocracy or monarchy, nor issues of moral merit or demerit, to have any role in the determination of family legal issues.

For this reason, Petitioner claims that the closest political and economic analogy to the legal institution of the American family to be classical Marxism. Petitioner goes so far as to claim that under Respondent's law, or more precisely, under the laws of the member States of the Respondent's federation, marriage is treated as a commune, an idyllic classless and property-less society. All are equal; all new material possessions are owned in common. There is free love between the founders. Each is to be selfless in support of the whole, each must suppress their individual greed and promote the interests of the entire group. The governing principle is 'to each according to his need, from each according to his ability.' Petitioner goes on to claim that there arises in marriage, as in most communist states, a state apparatus of terror, informants, physical force, and a black market. The problem of the commons and lack of incentive drives the parties into opposition and apathy. Usage disputes are soluble only by stealth or force. Stealth creates the black market, each spouse hoarding or squirreling away this and that. Force creates domestic abuse. The state is called in with its truncheons by either spouse or offspring, as each informs on the alleged crimes of the others; arrests are made on the basis of mere allegation.

Respondent immediately countered that these perceived shortcomings are not deficiencies of its law, but defects of individual love and effort, for which it cannot be accountable. Thus, for all these problems Respondent's solutions are love and persistence. Petitioner notes that these, like the rest, are principally communistic suggestions. Marxism requires a love of the fellow man, summed up in the expression 'comrade.' Regarding averting the problems of marriage by allowing more time for things to work out and people to learn to live harmoniously, this, too, is the same in

³¹⁸ Aristotle, *Politics*, Book I, Chapter II, from 1252a24.

Marxism, which exhorts a faith in the inevitability of the communist evolution. Thus, under State law in the Respondent's nation, the lover's paradise is the same as the worker's, or so it would appear.

Petitioner claims that divorce is also governed by the Marxist concepts. Division of property and alimony are governed by the principle 'to each according to his need, from each according to his ability.' The forces of capitalism are held in abeyance, ownership of property within the greater capitalist society is ignored and the principles of the communist family are preserved. Power over property is according to need, not deed. The owner is defensed by operation of the system, and his property is redistributed according to the need and ability standard.

This political composition of the family, even if Petitioner's conjecture as to its Marxist color is incorrect, demonstrates that it plays a significant role in the overall composition of the state, and that family law and doctrine have not only political and economic roots, but that they effect the overall operation of the greater political and economic societies in which they reside.

The family's federal nature is clear when one looks at the power structure which obtains between grandparents, parents, and children. A child, for example, has sovereignty over his muscular operations, and thus a degree of self government. He must obey, however, the stronger power of older and bigger siblings. This is akin to states competing with one another. All siblings, however, must obey the parents in some matters, such as, perhaps, when, how and what to eat. And yet each sibling can voice pleasure or displeasure at the offerings and thus exercise some influence over the future meals. So in eating there is a federal system operating, one in which each sibling controls some aspects of the whole affair, especially their own muscular operations, and the parents control other aspects of the meal, namely the provision and preparation of the food, establishment of protocol, etc. These families will, at a family holiday for example, eat with other relatives and their families. So, the sibling's aunt's family, for example, may be eating with the sibling's own family. Perhaps a grandparent is there as well, in which case there will be a third authority, the grandparent, patriarch or matriarch as the case may be, who controls some aspects of the gathering. The grandparent's children, each having families, will control other aspects of the gathering, especially pertaining to their respective families, but also regarding the whole affair, and lastly, the siblings will retain some domain of control, respecting their own sphere of activity, with some modicum of influence on the whole, either directly by boisterousness or indirectly through influence upon their parents, uncle, or aunt. A federal system is in operation, although few people notice it. This is irrespective of the functional role of each member; it doesn't matter who usually assumes legislative, executive, or judicial power within and among the families. They operate federally.

THAT BIRTH RATE PER FAMILY AND BIRTH ORDER IMPACT THE DEMOCRATIC ELEMENT'S POLITICAL IDEOLOGY AND PARTY COMPOSITION

Respondent is now willing to concede that family economic structures may be a species of constitution and therefore constitute political building blocks, but insists that such is irrelevant in this case, which revolves entirely around children of the

same family, all equally related as siblings, among whom no family constitution is pertinent as all are equals. We disagree, since there are no such thing as equal siblings, and the difference among siblings has important constitutional effects which cannot be ignored.

The children are normally the democratic element of the family. The parents are the aristocratic and monarchic elements, the dominant spouse being the monarchic power. The dialectical constitution is at work here too, for all familial power originates in a fused-power monolith which hews away legislative and judicial power for convenience sake, until no longer convenient, whereupon it reclaims them. If one woman controls the family, she will make all decisions, carry them out, and judge whether they are obeyed. When this becomes overly burdensome, she will delegate executive and judicial power to others in the family, usually another adult, retaining only legislative power. This is the ultimate position of ease. This will continue until inconvenient, whereupon she will reclaim the delegated powers by exercise of the legislative power, or until she loses power.

When parents delegate undifferentiated authority to one child over another, this is the analogue to administrative agencies in actual states. The injustice that usually results is identical. The judicial expression 'best interests of the child' is a measurement of equity identical to the 'interests of the people' in the harmonic constitutional setting in Plato's definition of true leadership.³¹⁹ Courts determine most issues relating to children, such as child custody and child support, by weighing the best interests of the children. This is analogous to judging government action by ascertaining the best interests of the people as opposed to those of the government.

Birth rate per family also impacts the political ideology and party composition of the democratic element. The children are the democratic element of the family, and thus a single child family contains a unitary democratic element. It is monarchic in all respects except its context. Several distinct outlooks arise from the single child situation. The child sometimes becomes either spoiled or overburdened with a responsibilities, or bears an overload of parental hopes and expectations. The tendency is therefore either to under or over challenge the child. Balance is rare. On the other hand, multi-child families have more competition within the democratic element, a competition which intensifies if the children are nearer in age, as such makes competition between them possible. If their ages are widely spaced they cannot compete due to the gross inequality of development and position between them. They tend in such cases to cooperate. First children tend towards a conservative and sober bearing, and second children often assume a more creative and unorthodox posture.³²⁰ A third child alters the former two yet again, and likewise a fourth impacts the first three. These conditions produce personal outlooks among the children which solidify in adulthood into political outlooks and party membership.

THAT SEXUAL MATTERS ARE NOT IRRELEVANT TO QUESTIONS OF POLITICS AND JUSTICE.

Respondent is now willing to concede that family matters may be germane to politics, but insists that this case revolves around a sexual matter, and that sexual mat-

³¹⁹ Plato, *Republic*, Book I, from 341 D.

³²⁰ Sulloway, *Born To Rebel: Birth Order, Family Dynamics, And Creative Lives*. Chapter III.

ters do not rise to the dignity of being politically relevant. Therefore, Respondent claims that its conduct regarding Petitioner does not belong in a political discussion and cannot be covered by the subject of political theory. On this rationale, Respondent insists that its actions towards Petitioner cannot be politically unjust.

We will not permit the Respondent, however, to shame or intimidate this court into avoiding the entire case by pointing out the sexual aspects of the Petitioner's circumstances. We are aware that Petitioner and her brothers are the children of an incestuous copulation. If her brothers had been legitimate, there would likely have been no fight between them, no mutual homicide, no illegal burial of Polyneices, and no suit by the Petitioner herein. Nevertheless, these sexual matters will not embarrass our inquiry on behalf of Petitioner. She is still entitled to justice. We must remind Respondent that sexuality is a politically important aspect of human existence and that sex has occasionally been the cause of devastating wars and revolution. Moreover, sexuality often underlies the corruption of government offices in all constitutions. As a cause of corruption, it is perhaps second only to greed, when it is not indeed an aspect of greed.

Several examples illustrate the enormous size of the role which sexuality plays in political matters. The Trojan war was in part catalyzed by the seizure and rape of Queen Helen. The Roman Kings were ejected in a civil war triggered by the Rape of Lucretia, whereupon the glorious Republic was erected. The Roman Tyranny of the Decemvirs was overthrown by popular resentment at the attempted Rape and mercy-murder of Virginia. The 'Rape of the Sabine Women' plunged Rome into war and drastically altered its constitution. In addition to and possibly more important than these non-consensual acts, consensual intermarriages and affairs among nobles and high-ranking political figures have been the sinews of thousands of governments throughout history. One could multiply such examples indefinitely, but the best is that almost every court in Nineteenth-Century Europe was related by some indirect sexual or amorous way to Queen Victoria of Britain.

Caesar's first wife, Pompeia, was a grand-daughter of Sulla, enabling Caesar to keep open channels of communication with, and glean information from, the Sullan party despite being champion of the opposite party, the Marians. During the triumvirate, Caesar married off his daughter Julia to Pompey, thus tightening their grip over Roman politics. More intriguing is Caesar's relationship with his lover, Servilia. These two exchanged favors throughout Caesar's career, several on behalf of her son, who is credited with stabbing Caesar and receiving the response, "Even you, Brutus?"

As these examples show, sexuality is pervasive in human nature and no less so in human politics and justice. The sexual liaison is a fundamental building block of political society. Our prior comments regarding the family should have made this clear. As de Waal noted, "There is a definite link between power and sex; no social organization can be properly understood without knowledge of the sexual rules and the way progeny are cared for. Even the proverbial cornerstone of our society, the family, is essentially a sexual and reproductive unit."³²¹ Therefore, we hold that Respondent's attempt to raise sexual, puritanical or privacy objections to Petitioner's complaints is a complete absurdity which we shall not consider further.

³²¹ De Waal, *Chimpanzee Politics*, Chapter IV.

THAT GENDER POLITICS IS NOT NATURALLY A BILATERAL FIELD

Petitioner asserts that there can be no justice in a nation whose jurisprudence recognizes legal differences between men and women, and in which all issues tend to devolve into destructive gender war. Respondent counters that such differences only mirror biological reality. We agree with both positions, since on the one hand there can be no enduring equality, stability or justice between bilateral contestants, such fights devolving into win-lose situations, and on the other hand, inescapable biological differences between the sexes require legal recognition, without which inequality of another kind results, namely incongruity between laws and objects.

The American city of San Francisco has submitted an amicus brief to the court, a friendly suggestion that there is, in fact, no need for injustice in this situation, since the role of homosexuality can supply stability and equality to the otherwise destructive bilateral gender war. San Francisco contends that trilateral competition creates justice in all systems, and that the gender war can be regarded as trilateral if the rights of homosexuals are recognized and taken into account. Men and women will be checked and balanced by the swing-vote of homosexuals, just as Democracy, Aristocracy, and Monarchy offset one another in the mixed constitution. Homosexuals will naturally counterpoise male and female opinion since they sympathize at once with elements of both. San Francisco reminds that this trilateral gender system comes from the creation of a third point of view rather than the creation of a third sex. They are not suggesting the utility of a YY sex-chromosome gender to offset the male XY and female XX sex-chromosome configurations.

Petitioner and Respondent have no comment regarding this brief, and we will take it under advisement whether a homosexual element can thus generate a gender-war balance of powers.

SECTION IV: POLITICAL PRINCIPLES FROM THE PHYSICAL SCIENCES

THAT SCIENTIFIC KNOWLEDGE CONTAINS THE POLITICAL LESSONS OF THE FEDERAL HARMONIC CONSTITUTION

Respondent asserts that we have provided no scientific backing for the theories we have advanced. Therefore, they claim that the injustice of their system remains unproved, as does the righteousness of our federal harmonic constitution. We disagree, since current scientific theories establish exactly what we have said regarding politics. The federal harmonic constitution is actually part of the law of nature, part of natural law, particularly descriptive natural law, like the laws of physics. Fractal geometry, quantum electrodynamics, molecular biology, special relativity, general relativity and chaos theory all establish beyond doubt that the natural law of political association is the federal harmonic constitution. As each of these fields is highly technical, however, we must explain how each one relates to and proves some aspect of the federal harmonic constitutional ideal. Only in this way can we adequately explain why we have ample scientific proof of our theory already. Incidentally, this will also clarify why we are unshakable believers in natural law. We will begin with the most important scientific field for political theory, namely fractal geometry.

THAT THE IDEAL CONSTITUTION IS FRACTAL, EACH PART A COPY OF THE LARGER WHOLE; WHEREFORE IDEAL POLITICS IS HARMONIC FEDERATION OF HARMONIC FEDERATIONS, AD-INFINITUM; A FRACTAL FORM

The ultimate mathematical principle of political association is the *fractal*. A fractal structure is one which is entirely composed of smaller copies of itself. For example, a chessboard is fractal, a square made of squares. More importantly, all natural entities contain fractals and are hence part of greater fractals.³²² Trees are fractal, their branches tending to be smaller mathematical copies of their trunks.

The federal harmonic constitution we have outlined is a quintessentially fractal structure. It is a federation of federations of federations ad infinitum. That the optimum constitution is a federation in which members micro-federalize and share the same constitutional format, is nothing else than the practical application of the fractal nature of ideal political association: a structure composed of smaller copies of itself; a federation of federations of federations. That families are susceptible to federal analysis extends this fractal system to the level of the individual. By analogizing the soul to

³²² Fractals were discovered and named by Benoit Mandelbrot. See generally, Les-moir-Gordon, Rood, and Edney, *Introducing Fractal Geometry*. For more mathematical detail, see Gouyet's *Physics and Fractal Structures*.

constitutions, Plato's *Republic* extended this fractal down to the metaphysical composition of the human being.

Since we have now identified the federal harmonic constitution, the larger truth can be seen, namely that the dynamic of human political association is fractal, that human political structures are ideally composed of smaller copies of themselves, down to the individual's own composition as a biological being, and that the ideal fractal pattern of political association is the harmonic federation, composed of harmonic federations ad-infinitum.

The stability and power of the fractal harmonic federation is unbeatable. It is the ideal towards which all systems either incline or perish. The city-state format is unable to partake of a fractal expansion. Therefore when the Greek city-states attempted to federate, roughly along fractal lines, they violated the fractal patterns, as when Athens perverted the Delian League. This is why their expansion ultimately failed. They were conquered by the Roman federal republic, which pursued a basically fractal federal growth during its period of greatest expansion. When Rome conquered Italy and the Mediterranean, however, it established non-fractal provinces governed differently from the Latin Federation of Italy. These accessions destroyed the Republic. Under the Empire, the municipal system of Augustus brought a brief return to fractal configuration, as the cities of the Empire were roughly equalized by independent administration of affairs, but the decay of this system and its replacement by administrative centralization under the Emperor's clerks destroyed the fractal pattern and again Rome fell into decay and ruin.

Imperialism fails for this reason; it cannot be organized in a fractal manner. The parts cannot mirror the whole because they are denied the essence of the whole, self government. Bureaucratic centralization likewise fails; it is not fractal. Local administrations are automated appendages of the central authority, not mirrors of it with like authority. Federations are the most easily expanded form of government due to their fractal nature. Non-fractal systems find expansion possible only through brute conquest, and their acquisitions remain inefficient and un-integrated with the whole. In fact, nations coalesce around naturally occurring fractals, such as language, geography, and economic circumstances; a coastal nation of fishing and trading towns sharing a language, for instance. They also fracture along fractal lines. A region with different language, religion, geography, economy, tradition or local government, splits away from its parent along fractal lines.

Madison in the *Federalist* no. 10 argued essentially that factions are fractal faults that should be controlled by multiplying them into insignificance, i.e. by making them so numerous that they become part of the fractal weave of the social fabric without tearing it into large anomalous pieces along fractal fissures. The political quandary of majority factions is really a problem of gross fractal incongruity.

We have already noted that federations composed of homogeneous member-states are strongest, and that this is actually a fractal formation. With this in mind, it is not hard to see that the republican form of government clause is the fractal guarantor in the American federal constitution. The federal government is a republican structure. The clause of the federal constitution which guarantees that America's member states maintain a republican form of government thus guarantees a fractal structure to the nation. The state of Colorado stands out as a particularly fractal entity, one of fifty independent governments in the federation, containing within itself fifty independent municipalities subject to home-rule micro-federalism.

THAT THE FRACTAL NATURE OF IDEAL CONSTITUTIONS RENDERS PURE MONARCHY UNSTABLE, WHEREFORE MONARCHY SHIFTS INTO FEUDALISM, ITS FRACTAL FORM

We have already discussed pure monarchy and its shortcomings, but now we can see that these are caused by violation of the fractal constitutional ideal. A pure monarchy cannot easily be made fractal. It cannot be composed of self-similar parts without introducing an aristocratic element. A King's establishment of baronies, which in turn establish subsidiary lordships, introduces the fractal essence of self-similarity into Monarchy, resulting in feudalism, a much more durable form of Monarchy, being a fractal blend of Monarchy and Aristocracy. In this regard, feudalism bears some resemblance to federalism. Its archaic spelling, foederalism, and the archaism of federal, foederal, shed light on the question of their similarity. They are both derived from the same Latin root. It is not surprising, therefore, that the two bear a certain similarity. Both imply a fractal unity attained from multiplicity.

The presence or absence of a fractal in Monarchic constitutions assists us with the overall question of political liberty. It teaches us that the fractal intrinsically yields liberty. This is seen in Machiavelli's overview of monarchies in *The Prince*:

...kingdoms...have been governed in two ways: either by a prince and his servants, who, as ministers...assist in governing the realm; or by a prince and by barons, who hold their positions not by favor of the ruler but by antiquity of blood. Such barons have states and subjects of their own...who are naturally attached to them. In those states which are governed by a prince and his servants, the prince possesses more authority, because there is no one in the state regarded as a superior other than himself, and if others are obeyed it is merely as ministers and officials of the prince, and no one regards them with any special affection.

Examples of these two kinds of government...are those of the Turk and the King of France. All the [former] is governed by one ruler, the others are his servants, and dividing his kingdom into 'sangiaccates,' he sends to them various administrators, and changes or recalls them at his pleasure. But the King of France is surrounded by...ancient nobles, recognized as such by their subjects, and loved by them...[Clearly] it would be difficult to acquire the state of the Turk; but having acquired it, it would be very easy to hold it. In many respects, on the other hand, it would be easier to conquer the kingdom of France, but there would be great difficulty in holding it...The causes of the difficulty of occupying the Turkish kingdom are, that the invader could not be invited by princes of that kingdom, nor hope to facilitate his enterprise by the rebellion of those near the ruler's person...[W]hoever assaults the Turk must be prepared to meet his united forces, and must rely more on his own strength than on the disorders of others...The contrary is the case in kingdoms governed like that of France, because it is easy to enter them by winning over some baron of the kingdom, there being always some malcontents and those desiring innovations. These can [give you] victory; but after-

wards, if you wish to keep possession, infinite difficulties arise, both from those who have aided you and from those you have oppressed...[T]here remain the nobles who will take the lead in new revolutions [and work against you in like manner]...³²³

Under baronial monarchy, the barons are an aristocratic element which can balance the monarchic. The barons, being smaller copies of the king, are fractal features, and they yield a degree of stability to the whole. Being partially autonomous, the barons exercise a degree of liberty impossible under pure monarchy. This can only be the case if their power is a fractal form, i.e. if they exercise similar authority to the king. The most important aspect of regal power to be diffused in fractal manner is the legislative power, as this is the key to forging a unified people. We saw this in our analysis of imperialism and the power of mutual legislative influence in the federal context. But as legislative power cannot usefully stand alone, it must cooperate with executive and legislative power. And since these powers cannot justly be exercised by the same hand, they must be separated into discrete and independent bodies.

Baronial Monarchy does not usually become extensively fractal. Indeed, Monarchy discourages separated branches. But when it fractalizes by adopting separated powers, it grows very strong. Great Britain provides a case in which the fractal format was broadly introduced into a Monarchy. First, the Magna Charta enhanced the power of the barony. This accomplished a fractal diffusion of power. The device of the common law accomplished another fractal diffusion of power, as the legislative power was partly disbursed throughout the communities. Later, Parliament gained independence from the King and then to an extent the judiciary gained independence. Thus, Great Britain had some fractal diffusion of power with some separation of powers under a monarchic constitution. This fractal made Great Britain the most liberal constitution of its day and laid the intellectual foundation of the United States, a still better, i.e. more fractal, configuration.

There is a more subtle reason, however, why the introduction of a fractal strengthens Monarchy: it introduces a slight degree of justice. Some of the oppressed are empowered in turn to oppress. The fractal monarchy is an oppression chain. At the top of the oppression chain is a pure oppressor; at the bottom, a person purely oppressed. In between lie people who are to some extent oppressed from above yet able to oppress those below. Towards the top of the chain are people who can oppress vast multitudes. Farther down are persons heavily oppressed with fewer and fewer below to oppress in turn. Some wretched at the bottom will be oppressed without anyone beneath to oppress likewise. There is a point of equilibrium somewhere along this chain, above which the average person will be content as a net oppressor but below which discontent, as mainly oppressed. Those above the equilibrium of oppression support or at least do not oppose the regime, whereas those below oppose or only reluctantly support it. There is thus an adhesive or cohesive effect in a chain of oppression. Many of those involved will be reluctant to overturn it for fear of losing that power over others which eases their own oppression. Members in such a chain of oppression will not tolerate its elimination unless they benefit on the whole, either by experiencing a net gain in power over others or over themselves.

Thus, the fractal Tyranny lacks total oppression. Net oppressors exist up to some

³²³ Machiavelli, *The Prince*, Chapter IV.

point and support the system. For this reason, the fractal strengthens Monarchy, even when Monarchy is corrupted into Tyranny. This is not a great system, but it adds a degree of justice to an otherwise miserable one. Thus we can see that fractal constitutions are the essence of liberty, they are its seedlings, or rather its soil. Feudalism is not the optimum fractal of political association. But it avails itself of a fractal. We have already claimed that the Harmonic federation is the optimum political fractal. Yet feudalism derives great strength from its fractal form, lasting over a thousand years in Western Europe and nearly as long in Japan.

THAT NATIONAL BORDERS ARISE FROM THE INTERPLAY OF EVER-EXPANDING CIRCLES AND THEIR UNDERLYING FRACTALS.

We have already noted that federations gain additional strength from contiguous membership, since this usually adds greater resources to the defense of less border. Now we can conclude this line of reasoning by noting that this at heart a circular tendency. The circle is the shape which encloses the most space with the least perimeter. Hence, the circular border is the ideal with respect to maximizing the ratio of resources to border. This is also true with respect to political efficiency. All elements of the harmonic constitution work most efficiently in a circular area, where the power center is in the circle's center. For instance, when we consider the executive element, executing the laws is quickest when the executive can reach all areas in a similar time frame. Militarily, this is the principle of interior lines. A central power center is more easily defended from invasion, being distant from any point of border attack. But the idea of interior lines also applies to the other constitutional elements. Considering the democratic element, it is clear that the people exercise consent and form customs more uniformly in a circular area. Representatives are rendered equally powerful when each has identical access to the deliberative assembly. Those from distant areas have diminished ability to represent their constituencies, being either less often in touch with their people or less present at the representative assembly. Thus, circularity tends to create more uniformity in representation as the constituencies gain equidistance from the power center. This is also true in the transmission of information and news, including the promulgation and interpretation of law. Thus, it is easy to sense how circularity improves the judicial element and likewise improves the efficiency of capitalism and its interplay with the aristocratic element.

In a world of perfect competition, time would thus favor circular-shaped countries with central power centers, all other things being equal. Review of geography confirms this to some extent. France and Spain were the first European nation-states to rise after the dark and middle ages. They are both somewhat circular in shape and have capitol in the center. Germany arose later, but along a similar circular plan. When geopolitical forces are allowed their natural interplay, there is an inclination to favor and create circular nations. Moreover, when nations are designed or constructed, circularity and central power centers are often intentionally chosen.

But France, Spain, and Germany are not circular. They are only roughly circular. This is because the circular tendency is tempered by the geography and demographics inherent in the land and people beneath the would-be circle. Rivers, lakes, oceans, mountains, languages, and customs all impact and modify the circular ideal to arrive at the actual border, which abuts another national border resulting from the same

process of modified circularity. The forces of geography and demographics are actually the fractals which underlie the circle. Thus national borders arise from the interplay of ever-expanding circles and their underlying fractals. The French often refer to France as 'the Hexagon,' since it is very nearly hexagonal in shape. This is a result of its circular impulse modified by the Atlantic Ocean and English Channel in the North, the Mediterranean and Alps in the South, the Pyrenees mountains in the West, and the Rhine area rivers in the East. Germany has a similar fractal modification of its circular impulse as well, although the result is not hexagonal. Counter-clockwise, these are the North Sea, the Rhine river, the Eiffel, the Saar river, the Danube river and Alps beyond, the mountains enclosing Bohemia, and the Oder river.

This circular tendency explains the phenomenon of states like Belgium, Luxembourg, and Switzerland. Circles cannot perfectly fill a plain. When they abut, they leave gaps between them. These gaps are power vacuums within which the modified circularity principle creates smaller states. Circles are unlike triangles, squares, and hexagons, which can cover an area in a pattern composed of themselves without leaving gaps. In geometric terms, they tessellate. A chess-board is an example of tessellating squares. Squares can fit up against each other without leaving any gaps. Circles do not tessellate. They leave gaps which, depending on the underlying fractals, will form into separate states on the modified circular format. These will still not fit precisely without leaving smaller gaps, and this creates the possibility of either non-circular borders or additional states in the smaller gaps. The size of such states can be estimated as follows.

When four circles of diameter 4 abut one another such that their center-points define a square, the gap created between them can accommodate a secondary circle as large as that with a diameter equal to the square root of 3. The four gaps remaining between this circle and the original four can accommodate 4 tertiary circles each with a diameter of one-quarter the square root of 3. On the other hand, when only three circles of diameter 4 intersect, the largest gap-filling circle will be of diameter .6666, or two-thirds.

The Intersection between France and Germany can be considered in this context. These two great quasi-circles come together along the Rhine river border. They do not tessellate, and they leave a gap between themselves and the Atlantic in which lie the nations of Belgium, the Netherlands, and Luxembourg. These latter three are examples of states forming in the areas of 2 non-tessellating circles. As one might expect, their sizes closely approximate the ideal areas of the secondary and tertiary circles in a 2-circle gap. In the case of the Franco-German border, the size of this gap (and the states within) should be roughly half the size of the gap formed by 4 non-tessellating circles, as the Atlantic ocean effectively cuts such a gap in half. In the 4 circle scenario, there would be exactly one secondary circle and four tertiary circles. Thus, in the two primary circle scenario like Germany and France, there should be half a secondary and two tertiary circles. The primary circle is 8.53 times the area of the $\frac{1}{2}$ secondary and two tertiary circles, and 85 times larger than the tertiary circle. Interestingly, France *actually is* 8.5 times the area of the Benelux countries, and eighty-five times the size of old Luxembourg, before over half of it was ceded to Belgium.³²⁴

This accordance is surprising, since the shape of borders is not simply the result of ever-expanding circles, but also the effects thereupon caused by the underlying

³²⁴ France is presently 545630 sq. km. Belgium is 30230 sq. km. Netherlands is 33889 sq. km. Luxembourg was approx. 6186 sq. km.

fractals and neighboring states growing likewise. The fractals should distort the areas. However, in this region of the world, the fractals have reinforced the circular phenomenon. The Benelux countries are cut with rivers, split by linguistic divisions, and have been bloody battle-grounds for centuries upon centuries, and almost all of the conflict has involved France in some important way. Moreover, the effects of British continental policy and American military action has had a dramatic effect on the continued existence of these countries. Through all this, these areas are nearly perfect ratios of primary, secondary, and tertiary non-tessellating circles. Therefore, France, Germany, and the intervening Benelux countries provide an example of the circular geographic tendency of political organization, and tend to obscure the effect of the underlying fractals. This is not to say that the circular impulse is the dominant factor in the evolution of borders. Strictly speaking, the circular phenomenon is one of the fractals. It is just one of many fractals acting on the result. But a glance at this part of the world helps explain the principle that national borders arise from the interplay of ever-expanding circles and their underlying fractals.

THAT THE CLASS-BASED SEPARATION OF POWERS IS AN INFINITELY-REGRESSING FRACTAL ARRANGEMENT

The fractal nature of political structures is not limited to the federal and functional separation of powers. It also appears in the class-based. A pure constitution is pure because the other elements have been repressed, not eliminated. They still exist. They just exercise no power. So a Monarchy, for example, is really a super-dominant monarchic element sitting atop repressed aristocratic and democratic elements. In a mixed constitution, this is still true. Each element is a collection of all three, wherein two are repressed, a different pair in each case. The democratic element contains repressed monarchic and aristocratic elements. The monarchic contains repressed democratic and aristocratic elements. The aristocratic, likewise, contains repressed democratic and monarchic elements. This accounts for the observations of democratic and aristocratic activities within a Monarchic element.

For example, a basically 'monarchic' Executive branch may feature a president who has the real power, but consults with a circle of advisors, or 'cabinet'. The petty in-fighting and maneuvering of these advisors plays a role regarding to whom the president listens with whom he meets. Thus, an aristocratic dynamic is at work, even in the otherwise 'monarchic' executive branch. Moreover, the president may sense that all the members of his staff feel strongly about some matter, and his acquiescence to the general opinion introduces subtle hues of democratic influence. This makes it clear that the monarchic nature of the office is merely the dominance of a monarchic sub-element over aristocratic and democratic sub-elements. The same can be said for the sub-elements, which contain three constituent micro-elements as well, similarly related so as to have an overall character determined by the dominance of one micro-element over the other two. This is a fractal arrangement and shows that the fractal nature of political structures is not limited to the federal and functional separation of powers, but also to the class-based.

THAT THE POWER OF FRACTALS IN HUMAN ASSOCIATION IS EXEMPLIFIED BY THE FRENCH MILITARY REFORMS OF 1790's.

Introducing a fractal strengthens human political structures. An instructive example of this is the restructuring of the French military around the division system in the 1790's. The divisional format divided the French army into so many small copies of the whole, each an independent unit composed of everything needed to fight as an independent unit. Before this innovation, detachments from the main army were awkward and necessarily temporary, as they lacked many functions needful for true independence. The divisional army was far more efficient in a military sense. Divisions could be directed with greater ease, specificity and permanence than could ad-hoc detachments. Napoleon was able to capitalize on this efficiency in his methods of strategic and tactical envelopment. This is particularly evident in his maneuvers and victory at Ulm.

THAT GENETICS AND MICRO-BIOLOGY SHOW COMPETITION AND ARISTOCRATIZATION OPERATING AT ALL SCALES IN ALL LIVING SYSTEMS

Our political systems are identical to biological systems in both structure and evolution. One is merely a scaled-up version of the other. This becomes clear when one compares the federal harmonic constitution with the human genome, and with Serial Endo-Symbiosis Theory (SET), as posited by Margulis.³²⁵ Let us first look at SET, a theory of biological evolution. According to this theory:

New species arise from symbiotic mergers among members of old ones...All organisms large enough for us to see are composed of once-independent microbes, teamed up to become larger wholes. As they merged, many lost what we in retrospect recognize as their former individuality...The cells of plants and of our animal bodies...originated through a specific sequence of mergers of different types of bacteria...The idea is straightforward...

[For example,] four once entirely independent and physically separate ancestors merged in a specific order to become the green algal cell. All four were bacteria. Each of the four bacteria types differed in ways we can still infer. In both merged and free-living forms the descendants of all four kinds of bacteria still live today...[W]e can even deduce the specific order in which they merged...First, a sulfur- and heat-loving kind of bacterium, called a fermenting "archaebacterium" (or "thermoacidophil") merged with a swimming bacterium. Together the two components of the integrated merger became the nucleocytoplasm, the basic substance of the ancestors of animal, plant, and fungal cells. [Next,] an oxygen-breathing bacterium was incorporated into the merger...United, the subtle swimmer, the acid- and heat-tolerant archaebacterium, and the oxygen breather

³²⁵ Margulis, *Symbiotic Planet*, Prologue and Chapters I-III.

now formed a single individual and prolifically generated myriad offspring. In the final acquisition...oxygen breathers engulfed, ingested, *but failed to digest* bright green photosynthetic bacteria...The undigested green bacteria survived and the entire merger prevailed. Eventually the green bacteria became chloroplasts...The final merger gave rise to swimming green algae...ancestors of today's plant cells...[Thus,] the tendency of 'independent' life is to bind together and reemerge in a new wholeness at a higher, larger level of organization...³²⁶

Federalism is the political form of SET. It is symbiogenesis on a larger scale. Smaller entities merge together into new wholes, retaining some remnants of their former individuality and working together. This is the way all societies form and grow, from individuals to couples, into families, villages, cities, states, and finally federations. This is the aristocratic tendency inherent in all life. It is also visible in divisions of labor, comparative-advantage free-trade, the formation of political parties and the structuring of business entities. All of these are aristocratic trends featuring competition and mergers among smaller entities. In this respect, it is clear that SET is merely a microscopic rendition of what we consider political behavior.

As an aside, we should remark that the DNA itself is akin to legislative power. It is 'the rules' according to which the constitutional rules are made. To the extent that a political subdivision possesses legislative power, it is capable of participating independently in a federal system. In the same respect, the possession by mitochondria, for example, of DNA differing from that of the nucleus indicates a similar federal arrangement. Constitutional rulemaking power is compound and layered. Regarding which biological entities are akin to Executive and Judicial power, it should be clear at least that proteins are executive.

We have already shown that the Aristocratic tendency is fundamental to all political systems, even those denominated as economic. All things grow progressively Aristocratic, wherefore the separations of powers are necessary to preserve justice. As Margulis has shown, this lesson is rooted surprisingly deep within the chemical and biological essence of living beings. It goes down even further, however, right to the core of our genetic identity.

Our genes, composed of Deoxyribonucleic Acid (DNA), are organized in the same aristocratic political manner. Our genes are long strings of DNA containing the formulas for every protein in our bodies. But they are actually battlefields where various viruses struggle for survival. In that battle, viruses form teams naturally, and one very successful team of genes is that which together replicates a human being. But there are many other adverse and highly successful teams as well, present in the DNA. In fact, the genes which create the human being account for a meager 3% of our total DNA, our 'genome.' The rest are competitors and parasites, irrelevant to the human form. As has been summarized:

Genes...are stretches of DNA that comprise the recipe for proteins. The genome is littered, one might almost say clogged, with the equivalent of computer viruses, selfish, parasitic stretches of letters which exist for the pure and simple reason that they are good at getting themselves duplicated...Each gene is far more complicated than it needs to be, it is broken

³²⁶ Margulis, *Symbiotic Planet*, Prologue and Chapters I-III. (Emphasis supplied.)

into many different 'paragraphs' (called exons) and in between lie long stretches (called introns) of random nonsense and repetitive bursts of wholly irrelevant sense, some of which contain real genes of a completely different (and sinister) kind...But ninety-seven per cent of our genome does not consist of true genes at all. It consists of strange entities called pseudogenes, retropseudogenes, satellites, minisatellites, microsatellites, transposons and retrotransposons; all collectively known as 'junk DNA', or...more accurately, as 'selfish DNA'. [Most of these] are just chunks of DNA that are never transcribed into the language of protein...Nobody predicted that when we read the [human genome] we would find it so riddled with barely controlled examples of selfish exploitation...

[We have discovered that] evolution...was not so much about competition between [animal] groups, not even mostly about competition between individuals, but was about competition between genes *using* individuals and occasionally societies as their temporary vehicles...[We must] view the body as a vehicle for the genes, as a tool used by genes in their competition to perpetuate themselves. The body's survival is secondary to the goal of getting another generation started...[G]enes are selfish replicators and bodies are their disposable vehicles...[G]enomes, like bodies, are habitats replete with their own version of ecological competition and co-operation...replete with selfish sequences whose only function is survival.³²⁷

The truths which we have outlined regarding the composition and operation of macroscopic political societies are scalable, larger copies of what occurs on the microscopic level within all living bodies. Thus, the fields of cellular biology and genetics are directly analogous to political theory, only on a different scale. This is, of course, another example of fractal politics.

Thus, just as Margulis proved Darwin wrong, we have shown Hobbes to be in error. They were both wrong for the same reason: life at all scales is essentially cooperative, hence aristocratic; it competes *through cooperation*, not simply annihilation. Hobbes and Darwin postulated a war of all against all. We declare this to be impossible, that the normal political process features cooperation by ever-expanding groups; a phenomenon we call the aristocratic tendency of political association. Darwin postulated natural selection, a process of competition among all species, weeding out the weak and leaving the only the strong. This, too, is a mistake, for the aristocratic tendency of association governs evolution. Creatures cooperate in symbiogenetic structures, thereby aiming to succeed in their mutual competition. It is not a war of all against all. It ends up cooperative. DNA and RNA are competitive structures wherein retroviruses compete for replication and thus show that the phenomenon of competitive behavior is fractal, extending downwards within each being.

In summary, both the DNA structure and cellular symbiosis confirm that competitive cooperation—aristocratization—is also present at all living scales, in fractal form. Therefore, our political systems are identical to biological systems in both structure and evolution. One is merely a scaled-up version of the other.

³²⁷ Ridley, *Genome*, Chapter VIII (Emphasis supplied).

THAT CHAOS THEORY EXPLAINS THE STABILITY OF BOTH ANCIENT AND MODERN TRIPLE-MIXED CONSTITUTIONS, THUS SUPPORTING THE HARMONIC FORMULA

Chaos is the condition of constitutional health. Only in a chaotic region can the branches balance one another. Their interaction is a three body problem rendering the exact effects each has on the other indeterminable but by probabilities. This makes each branch less able to control, dominate, or marginalize any other. As the functions divide and recombine in the process of constitutional dialecticalism, they reach three and stabilize as chaos sets in. Perturbances then send them back to monolithic oneness.

The interaction of the harmonic elements forms interlocking feedback loops, and a non-linear system emerges which acts endlessly upon itself. But it does so in rotational manner, as the functional elements make clear. This creates gyroscopic stability, though the system is a chaotic feedback network. It therefore has holistic stability and direction in a far-from equilibrium state. Small influences can thus move the gyroscopic whole in new directions. This is the empowerment of the individual in harmonic system. An individual's efforts can indeed set off a non-linear iterative reaction which pushes the giant whole in a new direction.

THAT THE HARMONIC FEDERATION AND ALL THREE SEPARATIONS OF POWERS WITHIN IT RESULT FROM NATURALLY SELF-ORGANIZING FORCES IN NATURE

There are numerous self-organizing systems in nature, arising despite the whirlpools of chaotic loops. They are the strange attractors. Repeating patterns and recurring tendencies emerge, and one of these is the competitive nature of living things. This produces the basic ingredients of the separations of powers: competition between one, some, and all, government located here and there according to this and that priority, and the heartbeat of dialectical constitutionalism. These are naturally occurring phenomena, rooted in the self-organizing nature of human systems.

Political edifices arise naturally. When all natural forces bear upon each other, self-willed animals arise and naturally organize themselves according to the results of their competition. These organizations include all political and governmental structures. Thus, governments are automatically self-forming. They are regularities, or balances, arising within the chaotic flux of all forces. Thus, government is an automatic phenomenon, a self-organizing system arising from chaotic non-linear conditions.

THAT QUANTUM ELECTRODYNAMICS EXPLAINS THE BEHAVIOR OF THE DEMOCRATIC ELEMENT AND ITS INTERACTIONS WITH THE OTHERS IN THE HARMONIC CONSTITUTION

There is no infinite energy in a quantum thermodynamic system because only certain frequencies of energy are possible in any situation. Only some electron orbits ‘fit’ around a nucleus, and only some wave patterns fit together to form larger systems or cancel one another out to limit systems, or divide so as to reveal their ingredients. This is true in every part of science, and it is true in government. This describes the fractal form of federations, as well as the ratios of the harmonic constitution.

Only similar things are evenly divisible, and only evenly divisible things can be evenly balanced against each other. So, to balance elements of government and layers of government, all parts must be similar and evenly divisible. This means all parts of government must be self-similar; each part must look like every other, whether bigger or smaller. In scientific language, they must be ‘fractal.’ Only in this way can you balance them, keep them competing, and get the most power out of them. Cities must be structured like counties, counties like states, states like nations, and nations like federations. They must all be identical except for evenly divisible scale. Then they can be perfectly balanced, many weak against a few strong, and maximum power realized.

The democratic element is composed of individuals who nevertheless exhibit group characteristics. This is an extension of the particle-wave duality inherent in quantum electrodynamics. Even a particle of light exhibits wave-interference characteristics. Likewise, any individual will exhibit group-like tendencies, even when alone. The combined actions of individuals accumulate, creating a social variant of wave amplification in productive areas. This is the scientific heart of the principle of aristocratization.

THAT SPECIAL AND GENERAL RELATIVITY EXPLAIN THE INTERNAL CALCULUS OF CITIZENS AND THE CONSTITUTION’S DEMOCRATIC ELEMENT

...Einstein’s relativity fits into political theory in a fractal manner, each individual citizen is a Cartesian coordinate system, a “K” of Euclidean space-time, as is every association, party and interest group. Relativity is relativity of perception. There are as many perceptions as perceivers and groups of perceivers. There is a K for every individual perceiver. Then there is a “K” for each administrative entity and micro-federal part, and next the “K” of the whole nation, then ones for international leagues and groups, and finally the world K. A constitution is a crystalline juxtapositioning of all these K’s, a balancing of them. To balance them requires calculating their energy, their MC squared. The factors of this are population, education, innovative skill, technology...

Regarding the functional separation of powers, legislative vs. judicial conduct is a matter of relativity of simultaneity, and relativity of mass and size. This is because the distinguishing factors of the functions are past vs. future, whole vs. part.

THAT KINETIC ENERGY EQUATIONS GOVERN THE POWER OF STATES AND THUS UNDERPIN THE BALANCE OF INTERNATIONAL POWERS AND CONSTITUTIONAL ELEMENTS

Respondent protests that we have heretofore discussed liberty without defining it, and demands that we therefore vacate our opinions regarding their impairments of liberty. We are happy to supply the definition Respondent seeks and therefore will not retract any of our related holdings.

Liberty is the condition of maximum individual political power. As we have stated elsewhere, it is achieved by constitutional admixture of the mutually antagonistic elements known as freedom and equality.³²⁸ Pure freedom results in chaos; pure equality, in the opposite condition, inertness. Blending the two produces an environment of political liberty, a dynamic system affording maximum individual political power.

Respondent again protests that we have not supplied any scientific proof. We are therefore prepared to explain the physical laws which underpin our definition of liberty. Liberty is the maximization of individual political power. An individual's political power is not merely a result of his mind's unfettered dominion over his body and his environment. His self-government, however perfect, however tyrannical, will be physically weaker than the less-extensive self-government of one armed with superior technology and intelligence.

The power of an individual is amplified by the technology at their disposal. It is also amplified by their wits, their creativity regarding the use of things available to them. This is obvious with respect to intelligence, a faculty which gives them literally more choices than the unenlightened. The clever have more liberty than the dull because they have so many more choices regarding the same things. They are free to do more because they can conceive of more. Among equally clever people, those with superior technology will be able to go faster, farther, deeper, higher, lift more, see farther, and so on. They therefore have more choices and hence more liberty of action; more choices of self-government. With such technology, they will also increase the information available to themselves, through research, experiment, and experience, which further increases their liberty in the way just explained.

Thus, political systems that maximize technology and wisdom can create more liberty than others that seem freer. A mixed constitution which features modest amounts of individual freedom can thus give these people more actual liberty than a pure democracy, where the individual has maximum freedom but confusion reigns.

The scientific basis of this truth is found in the idea of kinetic energy, one form of which is potential energy. By understanding the potential and kinetic energy of systems containing sentient beings, it becomes easy to see which systems will produce the maximum individual political power.

³²⁸ *The Sophomoric Discourses*, Book VI, Chapter VI.

THAT SENTIENT LIFE IS A SOLITON WAVE IN THE FABRIC OF SPACE-TIME

Soliton waves maintain their energy and frequency by the coincidence of lack of adverse wave interference and addition of outside energy. They can collide without disturbing one another. They are therefore a method of creating and integrating biological and social movements on a grand scale. When cultures are solitons, acculturation and homogeneity are unnecessary to social concord and harmony. In this way, a citizenry can be a superconductor, a super-fluid. The soliton wave is the ideal method of information propagation through the harmonic elements. Each idea is a wave which must permeate the whole without obscuring or deranging any of the others. Thus, soliton waves are the only possible way for information to be propagated. The energy added to ideas in order to sustain the soliton wave must be carefully calibrated, and this is why government over-propagation of an idea is propaganda: such ideas are prone to damage the propagation of other ideas. Propaganda is the mass of ideas whose progress is not a soliton wave.

THAT THE THREE GROUPINGS OF SUB-ATOMIC PARTICLES MIRROR THE PER-CAPITA AND FUNCTIONAL SEPARATION OF POWERS

Sub-atomic particles naturally fall into three groupings, or families. These families happen to have characteristics analogous to the harmonic separation of powers. This is an instance of the fractal ordering of all physical things at all scales. Our governments are merely scaled-up versions of sub-atomic interactions.

The families and their attributes are as follows, with masses expressed in multiples of proton mass:

<u>Family 1</u>		<u>Family 2</u>		<u>Family 3</u>	
<i>Particle Name</i>	<i>Mass</i>	<i>Particle Name</i>	<i>Mass</i>	<i>Particle Name</i>	<i>Mass</i>
Electron	.00054	Muon	.11	Tau	1.9
Electron-neutrino	$<10^{-8}$	Muon-neutrino	$<.0003$	Tau-neutrino	$<.033$
Up-quark	.0047	Charm Quark	1.6	Top Quark	189
Down-Quark	.0074	Strange Quark	.16	Bottom Quark	5.2

When measured by efficiency, family one is Democratic, family two is Aristocratic, and family three is Monarchic. Measured by energy, the relationship is opposite, one is Monarchic, two remains Aristocratic, and three is Democratic. When considered by function, it can be argued that one is executive, two is legislative, and three is of course judicial. In this way, the elements of the harmonic constitution can be seen operating at the sub-atomic level in the structure of all physical things.

THAT THE AWKWARD SCIENTIFIC BASIS OF HARMONIC CONSTITUTIONALISM SPRINGS FROM THE INCOMPLETE STATUS OF MODERN SCIENTIFIC THEORIES

Respondent condemns all of our scientific reasoning, stating that these sections are nothing more than undigested fragments of scientific theories, thrown together in a confused mass. They claim that we have tried to titillate without any unified scientific theory or system. In our defense, we can only say that we have been constrained to use current scientific theories, and these are mainly unconnected and often contradictory. If Respondent is willing to release Petitioner and stay these proceedings for the time being, we will be happy to complete and integrate the various field and force theories, and then explain exactly how these produce scientific proof of the ideal nature of harmonic constitutions. The clerks of this court are still working on this project, and we expect them to complete it in the near future.

Respondent balks at this suggestion, claiming that as a repository of merely political wisdom, it is unlikely that we have the background and wherewithal to devise a scientific theory-of-everything. We respond, on the other hand, that since Government and politics embody this theory, (they are part of ‘everything’) then we may have more luck than pure scientists may. All we need to is describe ideal government and then draw the scientific conclusions therefrom. We expect to back into the theory of everything. If we understand everything about any thing, we by definition understand the whole of which that thing is a part. If we understand all political forces, we will understand all natural forces.

Respondent challenges these scientific findings on the basis that they are vague, citing our own language regarding the injustice of vague laws or judicial opinions. We require that challenges for vagueness be raised, however, in a derivative action after the case has been decided. We will therefore not hear such a claim at this juncture.

Respondent now waives its earlier insistence that we supply scientific proof for our theory of ideal government, stating that while we may indeed discover a theory-of-everything and then successfully show how it mandates a harmonic federal constitution, Respondent does not have enough time to wait for us to do so. We will therefore move on.

PART III: JUSTICE APPLIED TO RESPONDENT, THE UNITED STATES

SECTION 1: DOMESTIC MATTERS

THAT IN THE UNITED STATES, ADMINISTRATIVE AGENCIES VIOLATE THE SEPARATION OF POWERS AND THUS BREED INJUSTICE

Respondent contends that we have not proved America unjust in any precise respect, that we have merely advanced an alternate theory of government without identifying any specifically unjust aspect of America's system. We agree. Therefore, having outlined the features of the ideal constitution, we will proceed to compare these with the United States constitution and at long last answer the Petitioner's claim as to whether the government of the United States is an ideally just system.

Respondent argues that its constitution is facially in accordance with what we have already said regarding the separation of powers and that its system is thus ideal and unimpeachable. While we find much merit in this defense, we must note that injustice may be found not only in the written constitutional plan, but more importantly, in the way it may have been flouted, ignored, or incorrectly interpreted by the Respondent.

For example, we are immediately offended by the rise of government through administrative agency in the United States, as this flouts the mixed constitution and damns the federal structure. It is, therefore, inherently destructive to justice. Wherever un-separated powers exist within a nation, justice will perish. The ideal system of justice cannot exist in a nation of un-separated powers, even if such mixtures occur only at the bureaucratic extremities of the governmental edifice.

The Respondent replies that the administrative agencies do not deprive the other branches of the ability to carry out their respective constitutional mandates.³²⁹ Indeed, we note that the United States Supreme Court has adopted this theory. Blending legislative, executive, and judicial powers in the agencies, according to the Respondent's supreme court, allows its legislature to deal meaningfully with the realities and com-

³²⁹ *United States v. Nixon*, 418 U.S. at 711-712. See also *Morrisson v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Wd.2d 569 (1998) See part V, section A.

plexities of modern society. This is tacitly an admission that the constitution's system of separated powers cannot govern modern society, that the original plan was inadequate, and that mankind must hereafter rely upon institutions empowered at once to make, enforce, and judge rules, thereby dispensing with the checks and balances which for more than two thousand years have been shown to safeguard liberty.

Some have characterized the independent administrative agencies as a "headless fourth branch" of American government.³³⁰ To the extent that this nickname is deserved, it illustrates the unjust character of the agencies, as the constitution limits the government to three branches. It should be obvious that there can be no branch of government not established by the constitution.³³¹ But despite constitutionality questions, creating a fourth branch of government is a mistake, for it results in a quadruple mixed constitution, a format we have already seen to be inherently prone to revolution and dysfunction. Therefore, the very idea that agencies might be referred to as a fourth branch of government trips a shrieking alarm, warning not only of unconstitutionality, but more critically, of grave structural danger to just government.

THAT THE WASHINGTON AND ADAMS ADMINISTRATIONS' ACTIONS DO NOT ESTABLISH THE PRESUMPTIVE CONSTITUTIONALITY OF MIXING POWERS IN GOVERNMENT AGENCIES

The Respondent argues that the lax separation of powers in the agencies is justified by the fact that America's founders themselves encroached upon the separation of powers by creating the State and Treasury departments, proving that they sanctioned some degree of admixture. We hold, however, that the first administrations' actions do not define what is constitutional, nor are their actions presumptive evidence of constitutionality. They are, at best, proof of the political climate and pressures of the times and say little about their own constitutionality. Just as the alien and sedition acts do not argue for the constitutional acceptability of destroying the freedoms of speech and assembly, neither do the intentional blendings of separated powers performed during the infancy of the United States argue that the separation of powers doctrine is frivolous or disposable. The first administrations may not have seen the danger to their ideals which inhered in the institutions they built. The glory of these esteemed figures, for whom this court has the utmost respect, does not itself argue for the constitutionality of their creations, particularly when we note that they themselves admitted that the constitution was designed in part to protect against even the best intentions of the government. Their potential breaches of the constitution

³³⁰ A pejorative connotation, borrowing its sense of dread from the well-known American tale of the 'Headless Horseman', a ghost rider said to haunt certain woods in New England. The phrase is used by a federal court in *United States ex rel. Brookfield Construction Co. v. Stewart*, 339 F.2d 753, 886 (D.C. Cir. 1964), but appears elsewhere, notably in *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

³³¹ *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 892 (Judge Becker, concurring).

prove, at most, that they were right in both their cynical estimation of human nature and the dire need for checked and balanced offices. We agree that they did transgress the limits they set for themselves, but their transgressions prove that even they, at long last, were subject to the corrupting influences of ambition and power. We do not agree that their actions justify abandoning the separation of powers. Moreover, the State and Treasury departments could have been created without debauching the separation of powers. Each could have been subdivided into independent executive, legislative, and judicial divisions. In this manner, as government agencies proliferated, the like divisions could have been collected and administered by their respective branches.

THAT AMERICA'S FOUNDERS WERE NOT MERELY CONCERNED WITH CONTEMPORARY PROBLEMS, BUT WITH TIMELESS ISSUES

The Respondent next argues that even if the founders intended a strict separation of powers when they wrote the constitution, it is permissible to ignore them now because they were merely addressing their own Eighteenth century concerns while modern issues are different. We find both assertions wrong, since the founders correctly saw themselves as dealing with timeless issues, which indeed remain today.

The framers of the American constitution were deeply conscious of the timeless and delicate nature of the problems with which they grappled. So as not to forget their enterprise they summarized it atop the constitution they developed: "...to establish justice...and secure the blessings of liberty *to ourselves and our posterity*."³³² This indicates that they were thinking about the future. We can hardly mistake their frame of mind, for they candidly declared the enterprise to be one for the *whole human race*. Hamilton wrote:

...[I]t seems to have been reserved to the people of [America]...to decide the important question, whether societies of mankind are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force...and a wrong election of the part we shall act may, in this view, deserve to be considered as the *general misfortune of mankind*.³³³

But they were thinking of more than just the present and future of humanity. They were deeply influenced by careful considerations of mankind's past. This is proven by the literature which they studied in preparation for making the new constitution, writings replete with historical analyses of tyranny. The Eighteenth century thinkers who most influenced the founders held that the threat of tyranny had always existed and always would; that it was an age-old danger which would confront all generations. The authors of that era analyzed the evils of Tyranny in the examples of

³³² *The Constitution of the United States*, Preamble.

³³³ Hamilton, *The Federalist on the New Constitution*, Number 1. (Italics supplied).

Pissistratus, Nabis, Phalaris, Dionysius,³³⁴ Darius, Alexander, Sulla, Caesar, Catiline, Antony, Agathocles, Octavian, Nero, Caligula, Attila, Commodus,³³⁵ Julianus, Severus, Caracalla, Macrinus, Maximinus, Valentinian, Valens, Theodosius, Honorius, Arcadius,³³⁶ The Thirty Tyrants of Athens, the Thirty Tyrants of Rome,³³⁷ the Ephors, Cleomenes, Marius, Balboa, Pompey, Justinian, Minos, Otho, Vitellius, and Tiberius.³³⁸ The founders took all of these examples into account when designing the constitution. Thus, it is very clear that the founders were self-consciously attempting to solve recurring political riddles, and that they were carefully taking into account the past, present and future for all humanity. They were not concerned simply with local or transient issues.

Respondent contends that the above list of tyrants proves that the founder's concerns were unrelated to issues today. We hold, however, that these tyrants were mere examples of issues which remain stronger and more dangerous than ever. Though the tyrants are dead, the danger they represented is still very much alive. Thus, the founders' concerns remain today and shall always remain. The perpetual threat of tyranny has neither abated nor suffered obsolescence by the passage of centuries.

We would be overjoyed if the concerns of Tyranny were merely those of a bygone era, obscure stories from decrepit tomes, of terrible acts consigned to the past by the enlightenment and complexity of modern society. Were it that we could say so. Sadly, the long list of ancient tyrants pales in comparison to its modern counterpart, comprehending as it does so many unspeakable figures identical in their depravity to the ancient, but rendered far more disastrous by the dark perversions of modern science. The list only begins with the names of Mussolini, Tojo, Amin, Stalin, Pinochet, Zedong, Pol Pot, Nicholas II, and the unthinkable Hitler.³³⁹ Certainly, the concerns of the founders are similar to those of today, for we still confront the specter of tyranny and must guard against its onset from both within and without a nation. The Respondent is wrong to believe that the framers were concerned merely with contemporary issues; and the recourse to this fantasy will not be tolerated as an excuse for abandon-

³³⁴ For example, these four are discussed by Trenchard and Gordon, in *Cato's Letters*, Preface and in No. 12, January 14, 1720, and by Machiavelli in his *Discourses*, Book I, Chapter X.

³³⁵ The last twelve of these were all discussed by Algernon Sidney's classic *Discourses Concerning Government*; Thomas Jefferson opined that Sidney and Locke were the two leading sources for the American understanding of liberty and the rights of humanity. Skeptics will find this in the Minutes of the Board of Visitors, Univ. of VA, March 4, 1825.

³³⁶ These ten, from Julianus to Arcadius, were all discussed by Montesquieu in *The Spirit of the Laws*, see the index thereto for all the cites.

³³⁷ Perhaps a misnomer, as Gibbon declares that not all thirty of the Roman tyrants were necessarily tyrants. See *The Decline and Fall of the Roman Empire*, Chapter X.

³³⁸ Rousseau discusses these ten in his work *On the Social Contract*. We could add many others to this list. For example, Gibbon recites the notorious histories of Carinus, Magnentius, Gallus, Rufinus, and Aurelian.

³³⁹ We hesitate to enumerate even these for fear of accidentally conferring an undeserved compliment upon those yet unlisted. However, the point is clear and we must go on.

ing the doctrines preservative of liberty in the constitution. The Respondent's abandonment of the separation of powers in the agency context is a grievous political mistake and a seedling of tyranny.

THAT THE BLENDINGS PERMITTED BY THE CONSTITUTION ARE CHECK-AND-BALANCE DEVICES, WHEREAS AGENCY BLENDINGS ARE FOR ADMINISTRATIVE CONVENIENCE AND THUS TYRANNICAL

Respondent demands that their constitution allows them to violate the separation of powers, since Madison wrote in *The Federalist* that although "the accumulation of all powers in the same hands...may justly be pronounced the very definition of tyranny, [this does] not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."³⁴⁰ Respondent also notes that Montesquieu said the same thing, and that it is therefore constitutional to mix partially the separated powers.³⁴¹ We hold that Respondent has misconstrued this portion of *The Federalist*, which does not permit all blendings of powers but only those forming checks and balances.

In the next article of *The Federalist*, Madison summarizes that, "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."³⁴² Thus, Madison permits blendings only if they tend to *maintain* the separation of powers as a practical matter. Every example Madison then mentions is a check-and-balance device. The blendings which the Respondent seeks to excuse, however, are not check-and-balance devices, but structures designed to avoid the inconveniences of separated powers.³⁴³ They are facilitations of unchecked power. In no instance does Madison justify such blendings.

Respondent cannot create agencies which blend the separated powers in the name of utility and then claim that Madison sanctions such blendings. Madison opposed the blending of powers for the purpose of administrative convenience. He blessed the mixtures which helped preserve the equal separateness of the parts, not those which tended to obliterate the separation. Respondent would like to measure off some section of social existence and place it under the authority of an agency empowered to make, execute, and then judge all the laws related thereto. There is nothing of checks and balances in such a structure. It is merely an attempt to render government more convenient by violating the separation of powers. Madison never blessed such edifices, and we stand by our holding that Respondent's use of administrative agencies is unjust as it violates the separation of powers.

³⁴⁰ *The Federalist*, Number 47. Italics in the original.

³⁴¹ In the same passage we noted supra, from Montesquieu, *The Spirit of the Laws*, Book XI, Chapter VI.

³⁴² *The Federalist*, Number 48.

³⁴³ This is essentially the reasoning the supreme court relies upon when it cites *Buckly v. Valeo*, 424 U.S. 1, (1976) (stating that the "hermetic sealing off of the three branches of government from one another would preclude the establishment of a nation capable of governing itself effectively.)

THAT CONTEMPORARY UTILITY NEVER JUSTIFIES THE TYRANNICAL GOVERNANCE CAUSED BY MIXING POWERS IN THE AGENCIES

Respondent next argues that the sheer utility and convenience of un-separated powers excuses them. We must censure the Respondent severely for its continued refusal to heed the most fundamental principle upon which public liberty depends, for liberty rises from limited and separated powers held in mutual check by competitive forces. We must address this utility argument immediately, as it stands in permanent conflict with every idea of constitutional liberty and limited government.

This utilitarian argument for mixing powers is often referred to as the functionalist approach.³⁴⁴ It posits that government exists for the people's good, which is best cultivated by efficient government, which in turn requires administrative agencies empowered to make, execute, and judge laws quickly and conveniently, without the conventional checks and balances inherent in a separated powers scheme.³⁴⁵ There is certainly a short-term convenience in this, analogous to that of enlightened despotism. The perfectly wise king is the most efficient government. But good kings ruin good people; and the wisdom of kings is rare and short lived. Kingdoms become tyrannies as surely as power corrupts. Over the short term, blending powers in agencies can be efficient; but in the long term, doing so destroys whoever it affects. Jettisoning the separation of powers in the name of efficiency eventually causes tyranny in the agencies and finally the destruction of the democratic element. This in turn collapses the harmonic constitution and leads to revolution.

THAT INDIVIDUAL RIGHTS UNDER THE CONSTITUTION MAY NOT BE MADE TO YIELD TO MERE CONVENIENCE

Respondent protests that the people have a fundamental right to convenient government. We cannot permit, however, 'convenient government' to be set up as a standard by which other more obvious and important fundamental rights may be violated. The right to liberty is a higher fundamental right than the right to convenience. It comprehends the right to enjoy the structural safeguards to liberty embodied in the separation of powers. It is a long-standing tenet of American constitutional jurisprudence that individual rights under the constitution "may not be made to yield to mere convenience, even if the majority of the people choose that they be... Individual rights may be claimed no matter how inconvenient society or its members may deem it."³⁴⁶ One could quibble that the enjoyment of separated powers is not a fundamental right under the constitution. Yet, one may as well argue that there is no fundamental right to have the constitution operate at all. It is implied that the American people established the constitution in order that it would operate, that the separation of powers established by it would come into being, and that this separation would be one of its

³⁴⁴ We are almost moved to call it the *dysfunctionalist* approach.

³⁴⁵ See Reese's *Administrative Law: Principles and Practices*, Chapter I, Section C.

³⁴⁶ 16A Am Jur 2d, §386, (citing *In re Brown*, 478 So. 2d 1033, (Miss. 1985)).

cardinal advantages. Certainly, the people's right to live under the constitutional design they established ought to be ranked as fundamental.

Parenthetically, we note that the ratification by the several states was predicated upon an expectation of separated federal powers. Hence, for the Respondent to abandon the separation of powers for convenience is also *a breach of the social contract which established the constitution*. In this light, the government is clearly under a duty to observe the separation of powers, for both the people and the American member states have a fundamental right to it, however inconvenient this right may seem.

We also not in passing that the separation of powers is essentially a division of labor along lines of specialization, and therefore does not necessarily entail inefficiency. There are efficiency gains to be made through specialization which Respondent has failed to adduce here. The rights of the people to efficient government is thus not necessarily impaired, but possibly advanced, even in the short term, by the separation of powers.

THAT THERE IS NO SUCH THING AS A NATION TOO COMPLEX FOR SEPARATED POWERS

Respondent argues that America is now too complex to function without mixed-power agencies, that it is too intricate for a constitutional separation of powers. We note that this argument was implicit in Justice O'Connor's majority opinion in *Commodity Futures Trading Commission v. Schor*, in which she argued that the adoption of formalistic rules regarding the separation of powers could impede Congress' need to take innovative action.³⁴⁷

This argument was used by those who cheered the destruction of the Roman Republic and applauded its Imperial replacement, a regime which Kent rightly termed the most extensive Monarchy to have ever insulted and enslaved mankind.³⁴⁸ The Roman state was said to be too complex, too large, too highly developed for republican government. Respondent corrects us that it never applauded the fall of the Roman Republic nor believed that Rome was too complex for liberty. We advise them, then, to see the parallel between the rhetoric which justified Octavian's seizure of absolute power in Rome and their own justification of the administrative state.

We must remind Respondent that complexity can justify *separating* the powers as easily as blending them. In fact, Respondent's own Justice White relied on such logic in *Immigration and Naturalization Service v. Chadha*, where he stated that modern governmental complexity justified stronger impediments to the exercise of agency power. In dissent, he lamented that the Federal Government's burgeoning complexity and size justifies a unicameral Congressional veto over executive branch agency actions in order to keep them under Congressional control.

Moreover, in a complex nation like Respondent's, it is not the case that an administrative state of blended powers is necessary, but most emphatically the opposite, for as states grow complex, the individual is placed in an ever weaker position relative to the state and must be increasingly vigilant in guarding against tyranny, even the pocket-sized, creeping tyrannies of administrative agencies. As a state grows

³⁴⁷ *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 851 (1986).

³⁴⁸ Kent, *Dissertations: Law Lectures*, Lecture the First.

complex, individuals are progressively less able to either understand or change it. This is the evil that complexity introduces into a political system, without adverting to which, complexity may appear contingently benign or even beneficial. This effect of complexity argues against admixtures of proactive power in agencies, assuming that the agencies themselves must be tolerated, and this assumption grows ever weaker under the mounting evidence of abuse. In particular, we note that Petitioner herein was placed in a position of the most extreme weakness vis-à-vis the most powerful agency imaginable, namely a military agency empowered to make, judge, and execute its own laws. It strains logic to argue that complexity demands such an overwhelming imbalance of power.

If anything, complexity justifies increasing, not abandoning, the separation of powers. It is impossible for a nation to be too complex for a separation of powers, for the more it grows complex, the more it will need such a separation. For all of the above reasons, we disagree with Respondent's thesis that complexity justifies violating the separation of powers in administrative agencies.

THAT THE AGENCIES' INEFFICIENT AND BUREAUCRATIC NATURE EXACERBATES THEIR TYRANNICAL CHARACTER

Respondent has based some of its defenses on the supposed efficiency of agencies. For the sake of argument, we left that premise temporarily unchallenged. However, Petitioner insists that the Administrative agencies are usually inefficient. We must ask whether indeed the agencies are, in fact, efficient at all, and if so, at doing what. It must first be conceded that agencies are bureaucracies. As Weber would agree, they are intrinsically hierarchical, and each element attends to a specific function. They lack competition and therefore grow inefficient by nature. Each worker rises to their own level of incompetence and, failing promotion, remains there until retirement. Work expands to fill the time allowed for it. Budget surpluses and savings are punished by reductions of future budgetary appropriations. It is absurd to hold that such entities are intrinsically efficient. Patently, they are not. They waste time, money and talent on a vast scale. However, they may be more efficient in the short-term than the checked and balanced system of legislative, executive, and judicial governing which they replace. They can thus be characterized as more efficient in the short term than a government of separated powers, but less than private enterprise. Thus, Respondent's complexity and efficiency arguments must be discounted, as the agencies are essentially inefficient bureaucratic structures when compared to private sector alternatives. If Respondent is seeking efficiency, it must explore privatization before it crates bureaucracy. Since Respondent has never mentioned privatization in these proceedings, we question the sincerity of their interest in efficiency.

THAT JUDICIAL REVIEW AND COURT-IMPOSED RESTRICTIONS ARE INSUFFICIENT TO STAMP OUT THE TYRANNY KINDLED BY THE INCESTUOUS RESIDENCE OF MIXED POWERS WITHIN AGENCIES

Respondent next argues that the potential tyranny of the agencies is greatly reduced by the power of the United States Supreme Court, which may enjoin or reverse the excesses of the agencies by applying principles of constitutionality and various court-created doctrines. This check upon their insolence is not fantastic but quite real; and in many minds it offsets the risk of tyranny kindled by the commingling of the separated powers under a single roof. In our opinion, however, the power of judicial review is an incomplete assurance of administrative fidelity. Review power is, alone, unreliable, being personal to the judges, capricious, fallible and indeterminate; and judicial scrutiny is ever subject to being placed in abeyance by the forces of priority and economy, whereas the impediments of the separated powers are organic, impersonal and perpetual. The Court's oversight is intermittent and artificial, while the mixed-power Agency's tendency towards tyrannical conduct is natural and omnipresent.

Lawyers and Bureaucrats will claim that the powers of administrative agencies are not tyrannical, particularly since they have been brought under the control of federal statutes and court opinions which limit and define their powers and procedures. The Federal Administrative Procedures Act, state Administrative Procedure Acts, and a myriad of court decisions have indeed erected an infrastructure of requirements and restrictions which restrain the agencies and have brought them into line with more traditional notions of fair play. These are not satisfactory solutions to administrative tyranny. They do, however, prove that such tyranny was a problem and that solutions were sought. Such remedial measures prove that the theories, statutes and cases which established the administrative state were myopic and deficient.

The clearest proof of the bias and caprice inherent in the administrative agencies is the existence of the regulatory acts governing the conduct of the agencies, individually and as a group, along with the court imposed restrictions on agency conduct. The courts and Congress both have been compelled to review the agency phenomenon and impose artificial restraints on these entities, in place of those which the separation of powers and federal checks and balances would otherwise have afforded. Congress was constrained to pass the Administrative Procedures Act (APA), which mandates certain safeguards and procedures for agency rulemaking and adjudications, while the court has stepped in and imposed restraints on agency actions by application of constitutional principles such as due process. These restraints, taken together, are largely unknown to America's original constitutional structure, for they are duplicative of the natural checks and balances established therein.

On Respondent's behalf, we acknowledge that other checks on agency power exist as well. A second check upon the agencies may be found in the power of Congress to repeal or modify their powers, subject to the strictures of regular legislation, namely bicameral passage and presentment to the president for approval. A third check consists in the president's authority to appoint superior officers to head such agencies, subject to the Senate's advice and consent, who are then presumably ren-

dered responsible to him by this power and his ability to dismiss them with impunity. A fourth check is formed by the powers of Congress to impeach the officers of the agencies. Thus, the small tyrannies embodied in the agencies, when acknowledged as such, appear to many scholars to be reasonably restrained and checked so as to constitute naught but a theoretical affront to the stability of Respondent's constitution.

If these remedial safeguards worked as well as those embodied by the harmonic separation of powers, there would be little reason to complain about the advent of the administrative state. Unfortunately, they do not. The reason for this is that the APA, along with judicial decisions and other statutes which variously restrict and compel agency actions are curative, not preventative. They operate upon the agencies only after an aggrieved party brings an action at law, leaving the agencies unchecked in the vast majority of instances. Thus, they are weaker restraints than the horizontal and vertical separations of powers built into the fabric of the original federal constitution of 1787. These checks operate at all times and restrain all actions, as ambition is a perpetual force, and the self-interest of parties and institutions never sleeps. Without these continual checks, the agencies are but intermittently compelled to exercise restraint. Therefore, they remain a format of governance largely unchecked, the very convenience of which renders tyranny and abuse almost inevitable. With this in mind, we are compelled to agree with Petitioner herein, that the United States has not created or maintained an ideally just system, for it violates the separation of powers in its toleration of mixed-power administrative agencies.

THAT AGENCIES' MIXED POWERS ALLOWS THEM TO FLOUT THE CONSTITUTION'S PROHIBITION OF BILLS OF ATTAINDER

Petitioner claims that the Respondent has covertly gained a power to pass bills of attainder through the use of its agencies. We agree that this power, forbidden by Respondent's constitution, has been recreated under the guise of Agency rulemaking and adjudication. It is obvious that an agency can decide largely on its own whether to address a problem by suing a chosen party and fashioning a new law by its decision of the case, or rather by simply making a rule for future application, subject to the APA's minimal notice and comment requirements. As the former method is more convenient, controllable and predictable, it is the favorite. The National Labor Relations Board is a prime example of an agency that does nearly all of its rule-making by trying cases and fashioning doctrines in the form of its own judicial opinions. There are due process limits to this power, to be sure, but so far as agencies legislate in this way, they are essentially able to enact bills of attainder any time they chose, i.e., they can fashion rules so narrowly drawn that they logically only apply to one party or a small group. This is forbidden by the Respondent's constitution. Congress cannot pass such laws. But, because of this abusive mixture of powers in agencies, Congress can create an agency that *can pass* such laws. This obviously flouts the rule that a principal cannot accomplish through an agent that which he himself cannot do. Congress cannot adjudicate, nor can it execute the laws. But it empowers its agents to do just this. One injustice resulting therefrom is the ability of Congress to pass bills of attainder by creating an agency and giving them charge over the matter. Thus, we

hold for Petitioner, that the Respondent has fashioned an apparatus for passing bills of attainder by creating its agencies, and this is both unconstitutional and unjust.

THAT EVEN MILD TYRANNY DEGRADES EVERYONE IT TOUCHES AND WEAKENS THEIR APTITUDE FOR SELF GOVERNMENT.

Respondent argues that even if the agencies do introduce a degree of tyranny, this is not ultimately injurious to the nation because the agencies are not so numerous as one might suppose, and their harmful effects do not ultimately impair the whole nation. This argument, like the others, falls short. Tyranny, even when restrained, degrades those who groan under its yoke. To the degree that agencies make, execute, and adjudicate their own laws, those subject thereto are, to that precise degree, injured. It is of no consolation to the governed that the agency powers are ultimately checked, for the license of proximate bureaucrats, scattered into a thousand subdivisions throughout the nation, will nearly always escape the distant vigilance of the courts, Congress, and the President. The individual will nearly always find it more economical to tolerate agency abuses than resist them, despite the injustice; and those few who incur the great expense required to rouse the indolent forces of agency restraint are certain to face a painful and time consuming journey back to those branches of government where checks and balances have been duly preserved and offer some hope of redress. Such a system punishes liberty and rewards obedience. It will produce in everyone it touches the same fatal enervation that it produces in the pure constitutional setting.

As structured, the agencies infringe the people's rights in a constant but usually minor fashion. And this makes them all the more dangerous because their evil is inconspicuous and unlikely to be remedied. The founders of the United States recognized that the frequent infringement on rights tends to weaken and eventually extinguish any sense of such rights.³⁴⁹ Hand restated the point in his lament that, "Given reasonable opportunity for personal favors and a not too irksome control, [the people of a Democracy] are content to abdicate their sovereignty and be fleeced, if the shepherds will only shear them in their sleep."³⁵⁰ Abject obedience will insensibly replace that participatory enthusiasm which alone distinguishes the citizens of a free society from the subjects of a repressive regime.

The agency's mixed structure renders the citizens progressively unable to undertake the tasks of self government. We must recall that a central evil of tyranny is that it destroys the minds of those under its yoke. Dazed by shades of enslavement, they progressively lose all familiarity with participatory government, suffering disenfranchisement without thinking twice, and eventually without thinking once. In Respondent's administrative state, this is occurring now, albeit so stealthily that the proponents of delegated agency power appear to be reasonable and even benevolent.

³⁴⁹ Hamilton, *The Federalist on the New Constitution*, Number 8.

³⁵⁰ Hand, *The Spirit Of Liberty*, Chapter X.

This is an example of what Montesquieu termed the ‘spirit of the laws.’ According to Montesquieu, the structure of law and government is not only shaped by, but also has a profound effect upon, those subject thereto.³⁵¹ That slavery dulls the wits and destroys the capacity for self-determination is, however, a very ancient truism, one voiced by Machiavelli in *The Discourses* and by Aristotle in the *Politics*.³⁵² Tocqueville shrewdly observed this evil in the Europe’s centralized government bureaucracies, concluding that the America of his time was blessed by its system of administrative decentralization:

Administrative centralization only serves to enervate the peoples that submit to it, because it constantly tends to diminish their civic spirit... When nations reach that point, either they must modify both laws and mores or they will perish, for the fount of public virtues has run dry: there are subjects still, but no citizens.³⁵³

America’s federal administrative agencies arose a century later and killed the decentralization Tocqueville so admired. The federal agencies’ blended powers, their centralized and inaccessible decision-making apparatus, and their intimate local reach render the citizens progressively unwilling and unable to participate in self government, precisely as Tocqueville’s axiom predicts. Some may retort that this supposed verification of Tocqueville’s theory is mere conjecture. Let them, then, prove that Americans are more ready to assert their rights to an agency tribunal than an independent court. Let them explain why the doctrines of primary jurisdiction and exhaustion of administrative remedies are necessary; both force litigants to use agency adjudication instead of, or prior to, using independent and impartial courts. These doctrines are necessary because litigants prefer a just and independent authority to one dominated by their adversary. Statutes and judicial doctrine, however, now force litigants to use internal agency adjudicative forums for many complaints previously cognizable in state and federal court. The very fact that litigants do not prefer to bring such actions within the agencies proves that such actions will be less numerous than otherwise, and that the advent of the agencies progressively destroys the willingness of citizens to pursue their rights. As for Respondent’s suggestion that agencies are not so numerous, we find this incorrect, as we shall see when we analyze the Respondent’s omissions from its written constitution.

THAT ONCE TYRANNY HAS DULLED THE PEOPLE’S CAPACITY FOR SELF-GOVERNMENT, REHABILITATION OF THAT CAPACITY IS ARDUOUS AND UNCERTAIN.

Respondent argues that a people once steeped in liberty will not relinquish their love for it, and therefore that no injury can be done to them by the progressively anti-

³⁵¹ Montesquieu, *The Spirit Of The Laws*, Part III, Book XIX, Chapter IV.

³⁵² Machiavelli, *The Discourses*, Book I, Chapter XV; Aristotle, *Politics*, Book I, Chapter V, and in a more causative context, Book V, Chapter XI, at 1314a12.

³⁵³ Tocqueville, *Democracy in America*, Part I, Chapter V, Section XII.

democratic nature of the administrative state. Respondent insists that whenever the prospect of self-government is offered to the people, it will invariably be accepted and exercised with perfect facility, as if the freedom had always existed. We hold that it is not so easy to rekindle a spirit of liberty once it has been extinguished. It is a very hard enterprise.

Many nations are concerned not with how to preserve the democratic capacity of their citizens, but rather how to kindle and promote such a capacity where it has either never existed or has been extinguished by the natural effects of tyranny. Still others must simultaneously preserve the capacity among some citizens while creating it in others. The United States was in this position after emancipating its roughly three million black slaves after the Civil War. But this need strikes any state wherein tyranny has supervened. Rome knew the need after Marius destroyed the Republic and spawned the tyranny of Sulla. Cicero's writings strove to rekindle the capacity of the Roman people to exercise political virtue and self-government. Cato made his life an example of virtue which he hoped would be imitated. Cato and Cicero failed, and the descendants of Gaius Julius Caesar ruled Rome as an Empire for two centuries. By the end of this 'Roman Peace' the civic spirit and capacity of the Roman people was utterly annihilated; they were never able thereafter to play a political role. They had become sheep. Japan was pushed to cultivate democratic capacity in its citizens after being forced by the United States to adopt a mixed constitution upon losing the Second World War. Japan evaded this requirement by annihilating the democratic capacity of its people, thereby restoring in fact the Oligarchy which the United States had destroyed on paper. Russia was confounded for decades after the fall of the Communist Soviet Union by the perplexing difficulty of awakening the people to the duties and methods of democratic activity. Montesquieu was particularly concerned with how to restore the spirit of liberty among Frenchmen long accustomed to the yoke of Bourbon tyranny.

Every age of written human history has struggled with the question of how to restore the individual's capacity for liberty. All that is required is to implant in the people an exasperation with their current existence and then provide alternatives which entail degrees self-government. If the people accustom themselves to these, they will form a habit of liberty. Their exasperation is best aroused by education, which is of two types, detached study and direct experience. The former is the more perfect method, the latter the more practicable, for the daily sufferings of tyranny can produce a desire for freedom, if sufficiently vexatious and insufficiently destructive. The supply of an alternative civic existence is harder to achieve. It requires creating a form of public participation which allows individual decisionmaking but is still not critical to the daily survival of the state. The daily repetition of self-governing is the surest and easiest method to inculcate a spirit and capacity for liberty in the people. And although this method may leave them with no intellectual understanding of that spirit, nevertheless, they will be enabled and motivated to preserve and exercise the freedoms which are parts of their daily life.

The danger lies in placing too much control in the people's hands before they have acquired the habits of self-government. If this is done, then the forces of Oligarchy will immediately exterminate the new freedoms along with the old regime and replace them with its own tyrannical rule. Such occurred after the French Revolution, where ultra-democratic institutions were structured in the immediate wake of an absolute Monarchy. Within a decade, these freedoms collapsed into the Oligarchy of the

Estates General, the Directory and finally the despotism of Napoleon Bonaparte. Conversely, similar freedoms and democratic institutions were easily maintained by America when it threw off British tyranny, for its people were long accustomed to commercial and political self-government.

The largest question concerning rehabilitating a spirit of self-government is, then, how to introduce self-governing activities into the daily lives of the people. This has been done in various ways, but religion and economic systems are two of the best vehicles for introducing and developing the people's democratic habits.

Religions often provide a forum and vehicle for individual actions and decisions. If correctly structured, they can cultivate among the devout a capacity for self-government. Indeed, this often makes them a target of government persecution or manipulation. Ecclesiastical ranks and systems can supply familiarity with public speaking, elections, decisionmaking, and even law-making, aside from whatever political tyranny obtains in secular government. Religious freedom gives to the people the government of all theological matters. Gibbon noted this aspect of early Christianity under the weight of Roman tyranny:

...[T]he human character, however exalted or depressed by a temporary enthusiasm, will return by degrees to its proper and natural level, and will resume those passions that seem the most adapted to its present condition...The ancient Christians were animated by a contempt for their present existence, and by a just confidence of immortality. [They] were dead to the business and pleasures of the world; but their love of action...soon revived, and found a new occupation in the government of the church. The safety of the [Christian] society, its honor, its aggrandizement, were productive...of a spirit of patriotism, such as the first of the Romans had felt for the Republic...Independence and equality formed the basis of their internal constitution...But the most perfect equality of freedom requires the directing hand of a superior magistrate; and the order of public deliberations soon introduces the office of a president...occasional elections...[and a] Christian Senate. Every [Christian] society formed within itself a separate and independent Republic...As the numbers of the faithful were gradually multiplied, they discovered the advantages that might result from a closer union...and the catholic church soon assumed the form, and acquired the strength, of a great federative Republic.³⁵⁴

This revival of the civic spirit among Roman Christians was short lived, as the democratic aspects of ecclesiastical authority were truncated and finally eliminated by Christianity's own aristocratic forces. Nevertheless, it supplies an excellent example of an institution which is capable of cultivating and reviving a capacity for liberty and self-government among a people long used to oppression and apathy. Another admirable method for kindling the same spirit is through the liberalization of economic activities.

A free-market system requires that individuals make decisions for themselves with respect to values and prices of goods and services. One service is that of their own labor, and when this is employed at their own direction and at a price of their

³⁵⁴ Gibbon, *The Decline and Fall of the Roman Empire*, Vol. I, Chapter XV.

own choosing, they become used to governing themselves in nearly all their daily economic activities. They work, rest, consume and trade based on their own decisions. Over time, this creates the habit of liberty and a taste for the rights of property and autonomy. As Montesquieu remarked, "The natural effect of commerce is to lead to peace...The spirit of commerce produces in men a certain feeling for exact justice...By contrast, total absence of commerce produces...banditry..."³⁵⁵ Thus, to permit or introduce degrees of capitalism into a tyrannical society stimulates democratic habits among the people. Of course, capitalism will eventually result in Aristocracy if left unregulated, as we shall see. But, if the free market is maintained in a competitive manner by antitrust or competition laws, it will kindle strong habits of freedom and liberty in the people. Thus, it is clear that the capacity of the people to govern themselves may be re-kindled after having been extinguished by tyranny, although such a process is time-consuming and delicate.

Respondent's ally Japan now moves to enter this case and submit a defense of itself, in light of our unflattering comments regarding their democratic element. We question whether their delegation has the proper credentials. Japan assures us, however, that its spokesmen were personally and carefully hand-picked by a committee consisting of the Emperor, the chairmen of the Liberal Democratic Party, the President of the Keidanren, and the head Boss of the Yamaguchi-Gumi. Further, Japan guarantees us that their delegation is the only one they have empowered, or ever will empower, to call upon this court. We must wait until later for Japan's actual comments, however, since the box purportedly containing them was found to be at last empty, despite many layers of the most exquisite wrapping we have ever seen.

THAT THE AMERICAN GOVERNMENT IS NOT COMPREHENSIBLE BY READING THE CONSTITUTION SINCE THE BULK OF AMERICAN GOVERNMENT IS NOT MENTIONED OR DESCRIBED IN IT

Petitioner next charges the Respondent with attempting to conceal the actual size and power of its Federal Government, by failing to provide a full and frank answer to the questions asked by the Petitioner during the information-gathering phase of this case. We will now consider the merits of this claim.

In order that trials be fair contests, it is necessary that adversarial parties to a dispute both have access to virtually all information relevant to the case. In many instances, one party will have such information but the other will not. In order to insure that justice is done at trial, procedures have been devised to allow and require each side to provide all relevant information to the other. Some information must be provided to the adverse party automatically in every case, without need of any formal request. Other information must be provided if formally requested. This is commonly called the discovery phase of a trial, and formal written requests for information are called interrogatories. In general, if the information sought in the written request is reasonably likely to lead to any admissible evidence at trial, it must be answered by

³⁵⁵ Montesquieu, *The Spirit of the Laws*, Part IV, Book XX, Chapter II.

the party receiving such written interrogatory.³⁵⁶ These rules are summarized in the Federal Rules of Civil Procedure, which the Respondent both created and claims to embrace wholeheartedly.

When Petitioner requested, however, by written interrogatory that the Respondent provide a complete description of its system of government, Respondent simply provided a copy of the Constitution, thereby giving an allegedly incomplete answer. Petitioner claims that this answer was so totally misleading that the bulk of government entities and edifices remained entirely hidden and unmentioned. The Respondent defends its answer by stating that a copy of the constitution is by definition a complete plan of government. Respondent insists that by providing a copy of the constitution, the Petitioner was given a complete plan of the American government and was enabled to glean from it the entire edifice of the offices and structures which comprise the United States of America. Therefore, the Respondent claims that its answer to the Petitioner's discovery request was full and complete to the best of its knowledge. Respondent also alleges that a more exhaustive description of the Federal government is unnecessary to the case.

First, we must express our disagreement with the Respondent's suggestion that an exhaustive description of government is unnecessary for the case at hand. The Petitioner claims that the American system of government is unjust. It is only fair that the Petitioner be able to find out exactly and entirely what that system really is. It is manifestly unfair for the Federal Government of the United States to hide the true size, scope and nature of its structure when the potential injustice of that structure is at issue. In fact, without a full and complete disclosure of its system of government, no judicial inquiry into the justice of the system is possible. It is therefore mandatory that the Respondent answer fully and exhaustively the discovery question asked.

We find the Respondent's answer to be grossly deceptive and utterly inadequate in view of the request made by the Petitioner for "a complete description and enumeration of its system of government." Certainly, a constitution is ordinarily a complete answer to such a question. However, the *American* constitution is a hopelessly incomplete answer, because the bulk of the American government is not described in it. To pretend that it defines the true size of the Federal government is simply fraudulent.

After carefully reading the entire American constitution again, we are certain that understanding Respondent's vast Federal Government is utterly impossible from that document alone. We agree with petitioners that the bulk of the government is not described by the document. Most of its offices, positions, jobs, entities, and structures are totally omitted. Worse yet, they are, for the most part, not even implied by the document. The written plan, in essence, leaves out most of the real plan.

For the benefit of the Petitioner, we will list the government entities which have been omitted from the American constitution, as the just or unjust character of the American government cannot be discovered without considering these entities. Now therefore, the American Federal Constitution omits all of the following:

The Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of the Army, the Department of the Navy, the Department of Education, the Department of Energy, the Department of Health and Human Services,

³⁵⁶ F.R.C.P Rule 33 (a-c).

the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, the Department of State, the Department of Transportation, the Department of the Treasury, the Department of Veteran's Affairs, the Environmental Protection Agency, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Commission, the Federal Maritime Commission, the Federal Trade Commission, the General Services Administration, the National Endowment for the Arts, the National Archives and Records Administration, the National Transportation and Safety Board, the Nuclear Regulatory Commission, the Office of Personnel Management, the Pension Benefit Guaranty Corporation, the Resolution Trust Corporation, the Securities and Exchange Commission, the Selective Service System, the United States Arms Control and Disarmament Agency, the United States Information Agency, and the United States International Development Cooperation Agency, the Administrative Conference of the U.S., the African Development Foundation, the Central Intelligence Agency, the Commission on the Bicentennial of the United States Constitution, the Commission on Civil Rights, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Defense Nuclear Facilities Safety Board, the Equal Opportunity Employment Commission, the Export-Import Bank of the United States, the Farm Credit Administration, the Federal Election Commission, the Federal Emergency Management Agency, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Mediation and Conciliation Service, the Federal Mine Safety and Review Commission, The Federal Reserve System Board of Governors, The Federal Retirement Thrift Investment Board, the Inter-American Foundation, the Merit Systems Protection Board, the National Aeronautics And Space Administration, the National Capital Planning Commission, the National Credit Union Administration, the National Foundation on the Arts and Humanities, the National Labor Relations Board, the National Mediation Board, the National Railroad Passenger Corporation, the National Science Foundation, the Occupational Safety and Health Review Commission, the Office of Government Ethics, the Office of Special Counsel, the Oversight Board, the Panama Canal Commission, the Peace Corps, the Pennsylvania Avenue Development Corporation, the Postal Rate Commission, the Railroad Retirement Board, the Small Business Administration, the Tennessee Valley Authority, and the U.S. International Trade Commission.

Besides these omissions, there are hundreds of agencies and commissions hidden within these omitted agencies, without knowledge of which, a very imperfect and incomplete understanding of the Federal Government emerges. Take for example the Federal Bureau of Investigation. It is a division of the Department of Justice, but plays such a prominent role that it simply must be mentioned in any complete account of the Federal Government. Other such entities include the following: the National Security Council, the Office of United States Trade Representative, the Office of National Drug Control Policy, the Office of Management and Budget (all within the Executive Branch), the Farmer's Home Administration, the Federal Crop Insurance Corporation, the Rural Electrification Administration, the Foreign Agricultural Service, the Agricultural Stabilization and Conservation Service, the Food and Nutrition Service, the Human Nutrition Information Service, the Office of the Consumer Advisor, the Office of Administrative Law Judges, the National Agricultural Library, the Agricultural Research Service, the Soil Conservation Service, the National Forest

Service, the National Agricultural Statistics Service, the World Agricultural Outlook Board, the Agricultural Marketing Service, the Animal and Plant Health Inspection Service, the Federal Grain Inspection Service, the Food Safety and Inspection Service, and the Packers and Stockyards Administration (all within the Department of Agriculture), the United States Travel and Tourism Administration, the Bureau of the Census, the U.S. Foreign Commercial Service, the Bureau of Economic Analysis, the National Institute of Standards and Technology, the National Technical Information Service, the Patent and Trademark Office, the Minority Business Development Agency, the Economic Development Administration, and the National Telecommunications and Information Administration (all within the Department of Commerce), the Social Security Administration, the Family Support Administration, the Health Care Financing Administration, the Food and Drug Administration, the Centers for Disease Control, the National Institute of Health, the Alcohol, Drug Abuse and Mental Health Administration, the Agency for Toxic Substances and Disease Registry, the Indian Health Service, the Administrations on Aging, the Administration for Children, Youth, and Families, the Administration for Native Americans, the Administration on Developmental Disabilities, the U.S. Office of Consumer Affairs (all within the Department of Health and Human Services), the Interagency Council on the Homeless, the Government National Mortgage Association (affiliated with the Department of Housing and Urban Development), the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Indian Affairs, the Bureau of Land Management, the Minerals Management Service, the Office of Surface Mining Reclamation and Enforcement, the U.S. Geological Survey, the Bureau of Mines, the Bureau of Reclamation (All within the Department of the Interior), the Drug Enforcement Agency, the Immigration and Naturalization Service, the U.S. National Central Bureau Interpol, the Office of the Pardon Attorney, the United States Parole Commission, the Bureau of Prisons, the Foreign Claims Settlement Commission (all within the Department of Justice), the Bureau of International Labor Affairs, the Bureau of Labor-Management Relations, the Office of Small and Disadvantaged Business Utilization, the Employment and Training Administration, the Office of Labor-Management Standards, the Mine Safety and Health Administration, the Pension and Welfare Benefits Administration, the Veterans Employment and Training Services, the Employment Standards Administration, the Bureau of Labor Statistics (all within the department of Labor, the Office of Foreign Missions within the State Department, and its diplomatic, consular and other establishments and delegations to international organizations, the Office of Commercial Space Transportation, the Board of Contract Appeals, the U.S. Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, the National Highway Traffic Safety Administration, the Urban Mass Transit Administration, the Saint Lawrence Seaway Development Corporation, the Maritime Administration (all within the Department of Transportation), the United States Mint, the Bureau of the Public Debt, the Bureau of Alcohol, Tobacco, and Firearms, the U.S. Customs Service, the U.S. Secret Service, the Federal Law Enforcement Training Center, the Internal Revenue Service, the Office of Thrift Supervision, the U.S. Savings Bond Division (all within the Department of the Treasury), the Veterans Health Services and Research Administration, the Veterans Benefits Administration, the National Cemetery System (all within the Department of Veterans Affairs), and the Science Advisory Board of the Environmental Protection Agency.

A complete answer to Petitioner's request also requires a full description of the institutions whereby Respondent governs Puerto Rico, American Samoa, Baker Island, Howland Island, Guam, Jarvis Island, Kingman Reef, Midway Islands, Navassa Island, The Northern Mariana Islands, Palau, Palmyra Atoll, The U.S. Virgin Islands (St. Croix, St. John and St. Thomas), and Wake Island, in addition to the commingled sovereignty of the American Indian tribes.

The length of these lists makes it clear that the true size of the Federal government is in no way related to the Constitution's brief contents. At issue in this case is the justice of the entire system of government, which includes all of the offices mentioned above. It would be very convenient but very fraudulent for the Respondent to pretend that its government was actually as small and refined as its Constitution suggests. In order for this analysis to proceed with accuracy, the Respondent should have immediately disclosed its entire governmental structure, instead of providing an incomplete and dishonest answer. In doing so, it violated its Federal Rules of Civil Procedure. For this reason, we hold for the Petitioner on this claim. No doubt, the Petitioner will use the long list of agencies and entities just provided as evidence of the Respondent's destruction of the original streamlined plan of the Constitution. Indeed, the list itself goes far to show the perversion of the separation of powers and the debauchment of the tripartite structure outlined in the constitution. The administrative state is admissible evidence in Petitioner's claim of injustice, hence the Respondent should have surrendered such information during discovery.

THAT THE CONSTITUTION IS A FINITE AND DETERMINATE DOCUMENT, AND CHANGES THERETO ARE VALID ONLY BY AMENDMENT, NOT BY INTERPRETATION.

Respondent argues that its ad-hoc creation of agencies and other extra-constitutional entities is acceptable under the constitution since the Founders did not expect the constitution to remain the same, but intended a flexible and indeterminate document which could accommodate posterity. Respondent concludes its argument by regurgitating Justice Marshall's phrase, "We must not forget, it is a *constitution* we are interpreting."³⁵⁷ Marshall meant that constitutions are by nature general documents, demarcating the broad outlines of government, from which the details must be deduced. Our Respondent contends, however, that Marshall hereby sanctions outright changes, including minor abridgments of the separation of powers. If the separation of powers is a "broad outline," then Marshall certainly does not condone its abandonment. Quite the opposite, he contends that the broader principles must be strictly observed in deriving the details. Marshall is emphatic on this point, stating that the limited powers of the various branches were written down so that they would not be mistaken or forgotten, and that such an exercise is futile "...if these limits may, at any time, be passed by those intended to be restrained." Clearly, if acts forbidden and acts permitted are equally tolerated, the very purpose of limiting and defining government structures is in vain. The constitution was, therefore, not intended to be, and literally cannot be, an indeterminate document. The separation of powers is literally the broad-

³⁵⁷ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819).

broadest outline in the constitution, as the powers are separated into their discrete institutions in explicitly separate articles. Marshall's language importunes the Respondent to respect these limits. His phrase is thus perverted by the Respondent who reads into it an excuse for virtually any convenient change, even one which violates the founders' intent or the broad outlines of the constitution. As Justice Black later reminded, the founders of the constitution were well aware of the need for change and provided for it through the amendment process.³⁵⁸ That amendment power lies with the legislative branch, not the courts. We reject, therefore, the suggestion that an alleged 'flexible constitution' gives American courts a power to amend the constitution and curtail the separation of powers, or that it gives the legislature a power to do so by simple majority legislation. The only flexibility built into the constitution is the amendment procedure in Article V. Congress, upon a two-thirds vote of both houses, can propose amendments. In the alternative, two-thirds of the state legislatures can call a convention to propose amendments. These will become part of the constitution if three-fourths of the state legislatures or state conventions ratify them, Congress choosing which. We will not recognize any other flexibility.

THAT SUBSTANTIVE DUE PROCESS, EQUAL PROTECTION, PENUMBRAL RIGHTS, AND THE NINTH AMENDMENT DISTORT THE CONSTITUTION BY RENDERING IT INDETERMINATE

We now turn to Petitioner's claim that the United States constitution is indeterminate and therefore functions in an arbitrary and unjust way. Respondent earlier testified that the due process clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause, the penumbral rights doctrine, and the Ninth Amendment authorize American courts to confer constitutional protection upon rights not specifically found in the constitution. These five items enable the justices to proclaim the constitutional status of nearly any right, so long as it can be found rooted in the "traditions and conscience of [America's] people...so rooted as to be ranked as fundamental."³⁵⁹ We agree with Petitioner that these doctrines have been used by Respondent's supreme court to render the constitution indeterminate and therefore arbitrary and unjust.

We are especially dismayed by the substantive due process jurisprudence. It has led the way in rendering the constitution superfluous to the determination of constitutional rights, as it has been held to protect those rights "which lie at the base of all [American] civil and political institutions,"³⁶⁰ or alternatively, those rights which are "of the very essence of a scheme of ordered liberty,"³⁶¹ and also, rights which constitute a "principle of justice so rooted in the traditions and conscience of [the

³⁵⁸ *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 Led.2d 510 (1965) (dissenting).

³⁵⁹ *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 Led.2d 510 (1965).

³⁶⁰ *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).

³⁶¹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

American] people as to be ranked fundamental.”³⁶² We need only use our imagination to see the infinite and untoward augmentation that this vague terminology affords to the court’s judicial review power.

In addition to rights derived from and protected by these phrases are many more which the Respondent identifies from the so-called penumbral light of other more explicit constitutional guarantees. In the courts words, “specific guarantees in the Bill of Rights have penumbras,³⁶³ formed by emanations from those guarantees that help give them life and substance.”³⁶⁴ Upon this penumbral emanation theory, many rights, such as the right to privacy, have been “read into” the constitution, although they do not explicitly appear in the document or its legislative history. We conclude that the penumbral rights theory provides yet another source of infinite judicial review to the court. This only adds to the indeterminacy of the constitution and thus exacerbates its arbitrary and unjust character.

These theories have rendered the text of the constitution practically unnecessary to resolving questions of which laws and rights are constitutional. Upon the especially frail foundation of due process, a huge superstructure of constitutional rights has been erected which are literally unknown to the constitution. These include the rights to have an abortion and use contraception, which, however popular and useful to society, have no literal derivation from the constitution. The Respondent has seemed delighted to find more and more fundamental rights based on substantive due process. Perversely, however, they refuse to apply this doctrine to economic rights, though these are more traditionally rooted than other amorphous rights created by the wand of due process theory. We shall examine the injury done to the Petitioner herein and to Respondent’s liberty and stability by this dichotomy later. Here, let us look carefully at how the Respondent’s supreme court has effected this most outrageous paradox, that “constitutional” need not refer directly to the constitution at all. Indeed, we are shocked that the Respondent would tolerate or defend such a Zen-like constitution, perfectly indeterminate in every way.

Respondent construed the ‘due process’ clause long ago to mean something more than merely the guarantee of government obedience to established procedure; Respondent considers it to mandate ‘*equitable*’ procedures and *fundamental rights*, which suggests a procedural and substantive congruity with principles of historic or even natural right. As such notions are extra-constitutional, so becomes the scope of guarantees inherent in the due process clause. It can guarantee both express and implied rights within the constitution, and transcendental, self-evident, or natural rights, free of any constitutional connection. It thereby becomes a vehicle for the supreme court to exercise a judicial review of laws unlimited by the constitution; it creates a natural-law judicial review, a plenary veto power over legislation the court deems bad or unwise. Alternately, the due process clause can be pictured as putting a natural-law doctrine *into* the constitution, making every natural-law principle part of the constitution. Either view of the clause demonstrates that it renders the supreme court’s judicial review plenary and indeterminate, converting it into a virtual amendment and veto power. We remind that a supreme court veto power was suggested and discarded

³⁶² *Snyder v. Massachusetts*, 291 U.S. 97, 105 54 S.Ct. 330, 332 (1934).

³⁶³ A penumbra is the scientific term for the light which surrounds the fringes of a bright object when perfectly eclipsed by a dark object.

³⁶⁴ *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965).

during the constitutional convention of 1787.³⁶⁵ In this regard, we hold that Petitioner is correct: the Respondent's constitution has wrongfully been rendered indeterminate and therefore unjust.

THAT THE 14TH AMENDMENT RESULTED IN AN ENTIRELY NEW AMERICAN CONSTITUTION, FUNDAMENTALLY DIFFERENT FROM THAT OF 1787

This due process veto power is not unconstitutional, according to our Respondent, since it is itself part of the constitution. We still find it unjust, and we are concerned that the Respondent does not fully appreciate the constitutional impact of this power. Its presence drastically restructures the government's system of checks and balances at all levels and between all branches. This is a cardinal reason why the adoption of the 14th Amendment resulted in an entirely new American constitution, fundamentally different from that of 1787. It is this quantum difference which raises the American civil war to the level of a complete revolution, for the regime which was divided into North and South did not survive the conflict, even in the North, but rather was supplanted by a super-federalist central authority and a court with full veto power. The American Constitution of 1868, not that of 1787, is the format of the current American regime. The constitution of 1787 lasted only eighty-one years. For this reason, it is often tempting to scuttle the theories adduced in support of the original constitution, as found in the Federalist papers and ratifying debates, for they are fatally violated by the 14th amendment, so much so, that only by grotesque sophistry can the constitution of 1868 be brought into congruity with that of 1787.

This is a defense overlooked by the Respondent, but we must raise it on their behalf. It is by far their most compelling defense, for if they are to interpret their current constitution by the intent of its founders, they can not have recourse to Hamilton, Madison, or Jay. They need rather to consult the founders of the 14th amendment. This defense, while meritorious, fails, however, for the simple reason that the 14th amendment's founders did not realize the scope and gravity of the change they were effecting in the constitutional shape of the United States. They assumed that their actions were largely complimentary to the political structure of the original constitution, that the change they were making was narrow. They did not foresee that the supreme court was receiving a veto power, nor that the sovereignty of the states would be nearly exterminated by the clause through its incorporation doctrine.³⁶⁶ When amending the constitution, they were not analyzing the entire edifice of government for theoretical purity and practical durability, as did the constitutional convention in 1787. In fact, the functionalist accusation which fails in the colonial context, applies exceptionally well to the authors of the 14th Amendment: they were concerned merely with contemporary issues, and could not possibly foresee the modern developments of American government. These gentlemen, unlike the colonial

³⁶⁵ See Madison's proposed 'council of revision'. Rakove, *Original Meanings*, Chapter III.

³⁶⁶ The incorporation doctrine posits that the 14th amendment's due process clause makes the Federal bill of rights, or parts thereof, binding on the states as well, although originally intended only for the federal government.

founders, *accidentally* created a new constitution. The Respondent is now living under it. It is indeterminate, and to that extent, we hold that it is unjust.

**THAT THE 14TH AMENDMENT IS CONSTITUTIONAL
BUT WRONGFULLY ENJOYS THE CONNOTATION
OF JUSTICE AND PATRIOTISM CURRENTLY ANNEXED TO
THAT TERM.**

Respondent reminds us that we have already ruled favorably on their constitution in the abstract, and that the Fourteenth Amendment was adopted in conformity with its amendment procedures and is thus constitutional. Therefore, Respondent argues, we should not hold the amendment defective in any constitutional sense. True, the due process clause is constitutional, but it is antithetical to the theoretical structure and justifications of the original constitution as advanced by the founding fathers. Respondent is correct that it is constitutional in the narrow sense, being part of a constitution. It is not, however, entitled to the prestige—the aura—of harmonized, balanced and ideal governmental architectonics evoked by the term ‘constitutional.’ The idea of constitutionality has recently come very close to meaning, simply, American, or right. This patriotic nuance flows from the document’s origin as a considered, integrated design for federation. It is this idea which places the double-dignity of antiquity and wisdom upon the older portions of the constitution.

Certainly, this patriotic aura is due in part to Respondent’s prodigal success and impressive record of liberty, a record which we neither deny nor seek to disparage. Respondent’s accomplishments, we confess, are laudatory in the extreme. We concede that the aura of justice which accompanies the term ‘constitutional’ is due in no small part to this exemplary record, one which Respondent has worked hard to foster, and one which is most deserving. However, we cannot offset the defects of this amendment with the credit Respondent has garnered in other areas. The 14th Amendment is new, and it does not deserve the high reputation that has been accorded to the entire document. In the words of science, it is a graft. To metaphorically exaggerate the point, one might say that the 14th Amendment’s presence in the constitution is like a re-sculpted hand on Michelangelo’s David, a new nose painted upon da Vinci’s Mona Lisa. Even if executed with some fidelity to the aesthetic essence of the original, the new section is not part of the masterpiece, though it is part of the thing. Thus the 14th amendment is constitutional, but we refuse to accord it the laudatory connotation of the term ‘constitutional’.

As we have seen in other contexts, the mere fact of constitutionality does not imply justice. The exercise of tyrannical power is constitutional in a tyranny, but this does not make it just. The justice of the 14th amendment is, likewise, fundamentally unrelated to its constitutionality. Its justness can only be seen by observing the role the Amendment plays in the nation’s overall constitutional structure and the international environment.

Above, we noted that the idea of constitutionality has been insensibly infused with an aura of patriotism and hints at meaning ‘American’. Actually, this is only part of its erroneous connotation. The idea of constitutionality has been further blurred by the habit of an entire nation which believes the term to connote *ideal justice*. This connotation proceeds partially from the fact that the constitution of 1787 tried to es-

tablish an ideally just government. But the pervasive equation of constitutionality and justice overwhelmingly comes from the 14th Amendment's incorporation of indeterminate natural right clauses like due process and equal protection. It is through this magic that the 14th Amendment appears even more "constitutional" and just than the older parts of the document, for it has come to surreptitiously define the idea of constitutionality itself. The amendment is, in this sense, connotatively self-supporting.

This deserves mention only because the masses, the people, whose consent and power are the indispensable ingredients of national might and ideal justice, are bound to be thrown off the search for justice by arguments such as Respondent has advanced here, which allege the justice of a thing simply by citing its legality, constitutionality or patriotic character. Respondent, who exercises such overwhelming power globally, should not quit the search for justice upon determining that something is 'American' or that it is 'constitutional', but rather, it should endeavor to seek out the true nature of justice in things and not be distracted by patriotism or legality. Justice is not legality; hence it is not constitutionality, which is but a type of legality. We do not mean to appear unduly critical of Respondent, but we are engaged in a search for justice here, and we must be objective, despite the fact that the Respondent has always been our most illustrious pupil in what we have taught, despite how far Respondent has come, and despite how proud we are of them.

THAT THE NINTH AMENDMENT INTERPRETATIONS HAVE LIKEWISE DISTORTED THE CONSTITUTION BY INTRODUCING INDETERMINATE PROVISIONS

The 9th Amendment states that, "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."³⁶⁷ This implies that other rights exist. Respondent's supreme court sees this as authorization to discover and protect those rights by giving them constitutional status. This reading of the 9th Amendment allows the court to create new constitutional rights on its own, thereby accomplishing a legislative act forbidden by the constitution's explicit placement of all legislative power in Congress.³⁶⁸

As Justice Black said, the 9th Amendment and due process clauses are mere pretexts allowing the court to "strike down all state legislation which [it] thinks violates 'fundamental principles of liberty and justice,' or is contrary to the 'traditions and collective conscience' of our people."³⁶⁹ Black continues to underscore the evil of this usurpation by explaining that it gives the court a *de facto* veto power over all legislation, which the constitution manifestly forbids. As we have said, this both introduces indeterminacy into the constitution and offends the separation of powers. We hold, therefore, that the Respondent is unjust with respect to its 9th Amendment jurisprudence.

³⁶⁷ *The Constitution of the United States of America*, Amendment IX, 1791.

³⁶⁸ *The Constitution of the United States of America*, Article I, Section One.

³⁶⁹ *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 Led.2d 510 (1965) (Justice Black Dissenting).

THAT CONSTITUTIONAL INDETERMINACY JURISPRUDENCE IS ACTUALLY THE SUPREME COURT'S ATTEMPT TO OBTAIN AN UNLIMITED LEGISLATIVE POWER THROUGH THE DEVICE OF JUDICIAL REVIEW

Again, Respondent protests that its supreme court is merely upholding and protecting the historically cherished values of the American people when it applies its due process, equal protection, and ninth amendment doctrines.³⁷⁰ Respondent insists that without such activity by its court, especially as undertaken by Chief Justice Warren, civil rights and civil liberties would be far below what they are today.

We generally approve of the civil rights and liberties created during the Warren court era. We merely wish to point out that these were largely usurpations of legislative power. These civil rights and liberties should have been the creation of the legislature, not a court exercising illicit legislative power via interpretation of vague constitutional provisions. Regarding Justice Warren himself, we admire him greatly. However weak his investigative skills, we consider him one of the greatest legislators of his time. We only wish that he had in fact been in the legislature.

The supreme court's attempt to obtain an unlimited legislative power through the device of judicial review is an extraordinary usurpation. Interpretation of indeterminate clauses gives it a virtual common-law legislative power where tradition can be adduced by the court to overturn acts of Congress. This is the most invasive and broad conception of American judicial review we have ever witnessed. It must be always remembered that Respondent's court holds the power of judicial review upon very uncertain tenure, as Jefferson remarked in his letter to Dolly Madison,³⁷¹ and as later jurists such as Learned Hand have reiterated.³⁷² Therefore, it is singular that a court would presume to annex to itself the extravagant power of a common law review, cloaked by the constitutional garb of these clauses. The English Parliament denied its courts this broad power of judicial review,³⁷³ though it was demanded by Lord Coke.³⁷⁴ Having no written constitution, the English courts were left with no power of judicial review whatsoever, while the American permutation was originally limited to statutory review in light of constitutional congruity; there was no intention on the part of the founding fathers to allow a reviewing court the power to invalidate statutes as contrary to custom, a procedure which would be a perversion even in a common law jurisdiction.

Respondent replies, however, that its supreme court was originally invested with a power of common law judicial review, and that Marshall's surreptitious desire was to invest the court with this power. In support, they also point to Justice James Wilson's belief that the legislative power in America was subordinate to natural law and

³⁷⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, (1989).

³⁷¹ *Letter of Thomas Jefferson to Mrs. John Adams*, September 11, 1804.

³⁷² Hand, *The Bill of Rights*, Chapter I.

³⁷³ See the dictum of *Lee v. the Bude and Torrington Railway Company*, L.R. 6 C.P. 576 (1871) at 582.

³⁷⁴ *Dr. Bonham's Case*, 8 Coke's Reports 114, (1610); Hil.7. Jac. 1.

revealed law, in addition to constitutional strictures.³⁷⁵ We hold that these contentions are incongruent with Marshall's handling of *Marbury v. Madison*³⁷⁶ and are explicitly rejected by *Fletcher v. Peck*.³⁷⁷ In *Marbury*, the necessary and proper clause was said to confirm the constitutionality of unenumerated powers, but only to such an extent that they were implied. The difference between the implied powers Marshall justified and the substantive due process powers is that the latter are unlimited while the former must be anchored in the text of the constitution itself. Marshall thus was not arguing for a broad, common law power of review, but merely a limited Constitutional review. In *Fletcher v. Peck*, Marshall's arguments were based on Constitutional prohibitions, whereas the concurring opinion of Justice Johnson was based on natural rights. This indicates that Marshall declined the invitation to broaden the court's review power into a common law or natural rights review, but rather kept the power restrained to the constitutional review established in *Marbury*. Concededly, Marshall hinted that state legislatures might be restrained by "general principles which are common to our free institutions," but his refusal to decide the case on the basis of natural law is of telling importance, particularly when the concurrence used just such natural-law principles.

Marshall's suggestion and then rejection of judicial review based on "general principles" is intriguing for another reason. If such review was already available to the court, why were the doctrines of substantive due process, equal protection, and the ninth amendment needed to support that very power in the twentieth century? Respondent here claims that Marshall and Johnson recognized a natural law review power in justification of expansive substantive due process and equal protection review powers. But if this power was preexisting, as Respondent contends, there would be no need for the ungainly apparatus of the Fourteenth Amendment and its incorporation doctrine. Respondent's struggle to justify its substantive due process, equal protection, and ninth amendment jurisprudence practically refutes their contention that any original power of natural-law judicial review existed, as this power is in fact sought by these later doctrines. By arguing that subsequent amendments generate this type of power, the Respondent impliedly concedes that the power did not exist in the constitution originally. Therefore, we refuse to alter our holding for Petitioner, that the Respondent has unjustly invested its court with an unlimited legislative power through the device of judicial review.

THAT THE EQUAL PROTECTION CLAUSE HAS ALSO BECOME A SOURCE OF INDETERMINATE CONSTITUTIONAL- ITY, AS PROVED BY ITS ARISTOTELIAN ROOTS AND CONTINUED MISAPPLICATION.

Respondent claims that its adoption of equal protection jurisprudence should be tolerated as a necessary restraint on their legislative branch. We hold, however, that it

³⁷⁵ *The Works of James Wilson*, Vol. I. Wilson was a delegate to the constitutional convention and an associate justice of the United States Supreme Court from 1789-1798.

³⁷⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 2 L.Ed. 60 (1803).

³⁷⁷ *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810).

has, like the due process clause, become a source of unlimited veto power for the court, which is unacceptable to justice and noxious to liberty. Its Aristotelian nature proves it to be a general equity doctrine affording the court a veto power which violates the scheme of the constitution and renders it indeterminate.

The equal protection clause is a virtual adoption of Aristotle's theory of distributive justice which we examined earlier. Distributive justice was shown to be a geometric proportion wherein distributions are equal not in respect to each other, but in proportion to the relative qualities of the donees: a big coat to the big boy, a small coat to the small one. It will be recalled that Aristotle's theory consisted in the observance of a mean between classes and their respective treatment. This is the heart of modern equal protection analysis, which essentially requires determining whether equally situated parties are treated equally under the law. The clause, in the court's words, requires that "all persons similarly circumstanced...be treated alike."³⁷⁸ From this interpretation, the court contrived the so-called congruence test for equal protection, which measured the relatedness, or "congruence" between a statute's objective and the class it creates. The court then developed a list of impermissible and suspect classes, such as those based on race, and announced that these automatically lacked congruence in all circumstances, and that any law creating such classes was bound to be struck down. Thus, the court was able to strike down legislation which either incongruously treated certain classes or recognized classes which the court found offensive to its own vague conceptions of liberty. Thus, by application of the equal protection doctrine, the court can veto any law it finds offensive to its own general sense of proportion or fair classification. This is a full judicial veto power, violative of the constitution.

Petitioner insists that this is a judicial usurpation of legislative power. We agree in part with this contention, but we must qualify our answer. We have already seen that a court's use of distributive justice is antithetical to the adjudicative process and a violation of the separation of powers. However, the court's recourse to the congruence test in an equal protection case does not constitute such a violation, for the application of the test is not itself a distributive act on the part of the court. Rather, it is a review of the legislature's distributive acts. It thus functions, in its purest form, as a judicial veto power over distributively disproportionate legislation. It is only as legislative as any other veto power, which is to say that it is potentially legislative. But the separation of powers tolerates, as we have seen, the ability of branches to check or impede the powers of the others. A veto power is not necessarily legislative if it functions merely as such an impediment. Only when *the prevention of legislation is itself legislation* does a veto power become obnoxiously legislative. And this occurs if the conditions of its use are determined by its user and the decision is final. Such an absolute veto is legislative and can be used to construct or destruct any legal structure the holder chooses. It is analogous to the work of a reductive sculptor, who creates his art by hewing away debris from a piece of rock. The presidential veto power is not obnoxiously legislative for this reason; it is not absolute, but may be overridden by the legislature. It is therefore merely an obstacle to the legislature, obstructive, but not to the degree of being destructive. The court has twisted an absolute veto power from the equal protection clause. For this reason, the court's equal protection jurisprudence violates the separation of powers and is unjust.

³⁷⁸ *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

Respondent protests that its equal protection doctrine strictly conforms with Aristotle's theory of justice and therefore cannot be unjust since we have already praised Aristotle's theory as the ultimate ideal of justice. We disagree, however, since the Respondent has abandoned the pure application of Aristotelian distributive justice in its equal protection jurisprudence. Respondent's supreme court began an immediate retreat from their lofty interpretation of equal protection when they claimed that disproportionality was, in fact, tolerable in some contexts. In *Railway Express Agency v. New York*, the court determined that laws may treat similarly situated persons differently if such bear upon discreet parts of a validly congruent class, though others within that class be ignored, thereby treating similarly situated persons differently.³⁷⁹ This was justified by the theory that a legislature is not obligated to solve an entire problem at once, but rather may take an incremental approach to solving public problems. Thus, by tolerating the geometrically unequal effect of the law as a temporary concession to the legislative process, the court found unequal treatment of equally situated persons constitutional. The practical merit of this legislative approach is its efficiency, which we have already seen to be often a ruinous trait of legislative power, one which affords the readiest means for the overthrow of liberty. As we noted in the constitutional context above, governments ought not to be overly efficient, but rather should be as inefficient as safety and competence permit, if liberty is to be maintained over the long term. Recall that this is the bedrock upon which the theory of the mixed constitution rests. Such criticism of the court's holding appeared in the dissent, where Justice Jackson disparaged the abandonment of strictly equal treatment, stating:

This equality is not merely abstract justice. [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally...[and] nothing opens the door to arbitrary action so effectively as to allow those officials to pick and chose only a few to whom they will apply legislation...³⁸⁰

Justice Jackson's practical concern for liberty displays an elegant understanding of the relationship between the lawmaker's appetites and the ease with which he can satiate them by visiting unequal and arbitrary penalties upon the governed. We have seen countless times, through countless centuries, that those who thirst for power invariably slake that thirst at the expense of anyone they can reach. The court's decision to relax the application of geometric proportionality in cases involving under-inclusive laws places an extravagant instrument of tyranny in the hands of legislators. This, however, did not end the court's retreat from purely geometric equal protection, however. But it did free the court to apply the doctrine at its discretion, making equal protection into a general equity doctrine, affording unlimited judicial review but not mandating any particular outcome. We hold that the Respondent, in its equal protection doctrine, has committed the sin Blackstone warned of long ago:

...considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than

³⁷⁹ *Railway Express Agency v. New York* 336 U.S. 106 (1949).

³⁸⁰ *Railway Express Agency v. New York* 336 U.S. 106 (1949).

equity without law, *which would make every judge a legislator*, and introduce most infinite confusion.³⁸¹

THAT THE SAME ARISTOTELIAN GOAL OF GEOMETRIC DISTRIBUTIVE JUSTICE UNDERLIES HARRINGTON'S IDEAL OF SEPARATING THE LEGISLATIVE TASKS OF DEBATE AND RESOLUTION.

As we have seen, the equal protection clause is one manner in which the ancient idea of distributive justice has been incorporated into the American constitution. Respondent asks for leniency in regard to their equal protection doctrine on the grounds that they had no alternative way to incorporate Aristotle's important theory of distributive justice. Respondent states that "such an important doctrine as Aristotle should not be omitted from our constitution." We are therefore compelled to note that it could have been incorporated in other ways.

We recognize in particular that the same Aristotelian goal of geometric distributive justice underlies Harrington's ideal of separating the legislative tasks of debate and resolution.³⁸² Harrington explains that legislative justice can be obtained in the same manner as distributive justice in dividing a cake, where the person cutting the pieces is not allowed to choose his piece. The division and the choice are separated, insuring an equal distribution. This bifurcation of dividing and choosing, which Harrington terms 'debate' and 'resolution,' is the device Harrington adopts to accomplish the goal that equal protection attempts in the American Constitution. They both seek to insure distributive justice. Legislative bifurcation of choosing and resolving is an entirely different mechanism from judicial equal protection review, but both have this identical purpose of implementing Aristotelian distributive justice. Compared with equal protection review, Harrington's method boasts the distinct advantage of being automatically self-policing, a feature guaranteed by human nature's innate selfishness. By contrast, judicial review is an after-the-fact policing system which may or may not be constant, depending on the character of the judges, who usually being neutral in the distributive question and not parties to the distribution, cannot be expected unfailingly to oppose unequal distributions. Harrington's structural suggestion lacks only the practical specificity of equal protection judicial review. He simply posits a popular referendum for each proposal of the legislature. It is tidy to say that the senate shall suggest the distribution and the people shall decide, but this analogy only imperfectly fits the actual phenomenon of legislation, most of which does not consist of distributions of two shares, one to the senate and one to the people, in which case only would Harrington's suggestion result in the intended distributive equality.

It is not our purpose here to build an alternative system to implement Harrington's legislative bifurcation concept, but merely to demonstrate that its goal is identical to that of the American equal protection clause, and thereby suggest to Respondent that the weaknesses in its equal protection review might be remedied by

³⁸¹ Blackstone, *Commentaries*, Vol. I, Introduction, § II. (Italics supplied).

³⁸² Harrington, *The Commonwealth Of Oceana*, The Preliminaries, Showing Principles of Government.

turning to some entirely different constitutional mechanism, even beyond the ambit of the judiciary, since such mechanisms exist. This possibility must be borne in mind when considering the threat to the separation of powers inherent in the equal protection review power. We therefore deny that the Respondent lacked other ways to incorporate distributive justice, and we accordingly refuse the leniency Respondent seeks on such theory.

THAT THE COURT'S INCONGRUOUS APPLICATION OF EQUAL PROTECTION PROVES THE DOCTRINE'S UTILITY AS AN OMNIPOTENT JUDICIAL REVIEW DEVICE.

Respondent objects that although we have disparaged their equal protection jurisprudence completely, we have adduced only one actual example of its abusiveness, namely its justification of legislative under-inclusiveness. Respondent contends that this is insufficient for a broad finding of injustice. We therefore remind Respondent that its supreme court also renounced Aristotle's conception of distributive justice with respect to citizens rights in *Zobel v. Williams*, where the court invalidated Alaska's plan to allocate natural-resource income among its citizens in proportion to the length of their state residency.³⁸³ There, the court asserted that the Alaska law impermissibly created degrees of citizenship based upon residential tenure, in violation of equal protection and the 14th amendment's express equation of citizenry with simply residency. This nearly set up a syllogism whereby no distribution could be made but by arithmetic equality, for unequal distributions create classes of citizenship, and classes of citizenship are unconstitutional. Certainly, not every unequal distribution creates classes of citizenship. However, under equal protection, the court is free to decide which do and which do not, again affording to itself a plenary and arbitrary power of equal protection judicial review. This decision makes it difficult for a state to recognize one group of citizens as more deserving or meritorious than another, for in doing so, the legislature might create classes or degrees of citizenship. Thus, under this analysis, even differently situated persons must be treated similarly when rights of citizenship are involved, unless the state can adduce a compelling interest in, and a narrowly tailored means of, doing otherwise. This test is "strict in theory and fatal in fact," to any such law.³⁸⁴ Thus, Aristotle's distributive justice is abandoned in the context of citizenship rights as well as in the aforementioned instances of under-inclusive legislation.

Interestingly, Alaska's stated objectives for fund allocations strongly evoke Aristotle's own rationale for distributive justice. Aristotle stated that "...if the persons are not equal, they will not have equal shares; it is when equal persons possess or are allotted unequal shares, or *unequal* persons [are given] *equal* shares, that quarrels and

³⁸³ *Zobel v. Williams*, 457 U.S. 55 (1982).

³⁸⁴ Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*. 86 Harv. L. Rev. 1,8 (1972). See also, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235, 115 S.Ct. 2097 (1995).

complaints arise.”³⁸⁵ This confirms that an element of merit permeates distributive justice, which is exactly what Aristotle proceeds to clarify:

[The fact that an equal distribution to an *unequal* party provokes anger] is also clear from the principle of ‘assignment by merit.’ All are agreed that justice in distributions must be based on desert of some sort, although they do not all mean the same sort of desert; advocates of pure Democracy make the criterion free birth; those of oligarchical sympathies wealth, upholders of Aristocracy make it virtue.³⁸⁶

The introduction of merit in the calculus of distributive justice forces the recognition that Aristotle and the proponents of Alaska’s law in *Zobel* believe the equal protection analysis rightly to include *qualitative* analyses; that it must weigh the relative virtue and merit of groups of people; that the calculus of geometric proportionality actually turns on the qualitative nature of the persons to whom distributions are made; the *good* coat to the industrious boy, the *bad* coat to the idle boy. It appears to be therefore unconcerned with quantitative, *per-capita*, equality, save in the narrow context advanced by the pure Democracy advocates, which is exactly where the *Zobel* court hangs its hat. Concededly, the court can not be said to violate Aristotle’s scheme if he himself rendered his geometric proportionality rather arithmetic in this specific place, namely, the assignment by merit of free birth. But free birth has normally been a far cry from universal suffrage; it would not have appeared arithmetic to Aristotle, nor to American jurists until the Twentieth Century. This fact may meliorate what otherwise appears to be a logical inconsistency in Aristotle’s theory. Notwithstanding, none can doubt but that Aristotle was proposing a qualitative analysis of human beings in order to calculate just distributions.

Philosophers have no trouble suggesting such a qualitative analysis of human beings. Not so, however, Americans steeped in an amorphous egalitarian dogma which they can usually half understand and only one-third describe. Justices are no exceptions to the national culture, in which exclamations of the actual equality of all persons are *pro forma* and recognitions of obvious inequality nearly unthinkable. The *Zobel* court is on safer ground demanding that citizenship have no division into classes, for this allows the court to eschew any qualitative analysis of whether some citizens deserve larger distributions than others, according to geometric proportionality, and instead decide that Alaska’s law should operate on arithmetic proportionality, a strict *per-capita* allotment of equal rights.

The court was not unanimous, however, in eschewing the qualitative analysis inherent in Alaska’s law. Justice O’Connor spoke approvingly of a more Aristotelian equal protection analysis when she stated that “A desire to compensate citizens for their prior contributions is neither inherently invidious nor irrational.” In footnote, she continued,

A state, for example, might choose to divide its largesse among all persons who have contributed their time to volunteer community organi-

³⁸⁵ Aristotle, *Nichomachean Ethics*, Book V, Chapter III, Part VI-VIII, at 1131a20. Italics supplied.

³⁸⁶ Aristotle, *Nichomachean Ethics*, Book V, Chapter III, Part VI-VIII, at 1131a25. Italics supplied.

zations, [or] a state might enact a tax credit for citizens who contribute to the State's ecology by building alternative fuel sources or establishing recycling plants...I would recognize them as valid goals and inquire only whether their implementation infringed any constitutionally protected interest.³⁸⁷

This would allow the court to analyze the qualitative differences among the recipients of the distribution to insure that it was made in proportion to the actual differences among them. If this proportionality obtained, then the court would apply whatever additional constitutional protections might be implicated, such as those deriving from the privileges and immunities clauses, the fundamental right to travel, &c. Thus, it is clear that Respondent's equal protection jurisprudence violated Aristotle's ideal of distributive justice in more than one instance.

THAT THE UNEVEN APPLICATION OF EQUAL PROTECTION PROVES THE COURT TO BE PERPLEXED BY THE CONFLICT BETWEEN EQUALITY AND VIRTUE.

The collision in the *Zobel* case between geometric and arithmetic hues of equal protection is actually an instance of the larger conflict between equality and virtue, which pervades justice and the subsidiary topic of political theory. Elsewhere, we deeply examined equality and found it irreconcilable with both freedom and her offspring, virtue.³⁸⁸ First, we examined the propositions that the free are free to be unequal, and that the equal never remain so when free. Secondly, we noted that virtue supposes some superiority and therefore inequality, for the superior must be different from, and thus unequal to, the inferior. These theories taken together impose the conclusion that virtuous is not equal, the virtuous being to that degree free and unequal. Such is the general antipathy between equality and virtue operating in the narrow example of the *Zobel* case, where arithmetic equal protection assumes the complete equality of donees, and geometric equal protection, their relative virtue. By extrapolation, the arithmetically proportionate equal protection is, perhaps, never a geometrically proportionate equal protection, and to enforce the one is to *destroy* the other. The *Zobel* case illustrates this paradox of recognizing virtue disproportionately in the name of proportional equality, and it demonstrates why Respondent can not adequately defend the operation of their equal protection clause. It is not that we find the clause inherently unjust. Quite the contrary, it is impeccably just. It is the way in which Respondent employs it that is unjust, for they apply it judicially, incongruously, incompletely, and arithmetically, all of which offend justice.

³⁸⁷ *Zobel v. Williams*, 457 U.S. 55 (1982).

³⁸⁸ *The Sophomoric Discourses*, Book VI, Chapters IV and VIII.

THAT THE SUPREME COURT RELIES ON VAGUE CONSTITUTIONAL CLAUSES BECAUSE IT DOES NOT FULLY UNDERSTAND AND THE SEPARATION OF POWERS.

Respondent argues that the equal protection doctrines it has evolved are excusable since they support equal rights among the citizens of all states. This is a laudatory aim, but it is not the correct object of the equal protection clause. Citizen rights are more properly protected by the separation of powers than equal protection. In criticizing the Respondent's arithmetic use of equal protection, we did not mean that citizen rights *ought* to be conferred in geometric proportion to virtue or merit. Rather, we merely sought to outline the operation of an arithmetic variant of Aristotelian distributive justice in the context of the United States Supreme Court's equal protection jurisprudence. On the contrary, we have said emphatically that citizenship classes retard national prosperity, as they tend to destroy the federal harmonic constitution and retard national defense. As Machiavelli observed, a Republic's success requires both vigorous naturalization and an unrestricted franchise.³⁸⁹ The first policy creates a large population of civic-minded nationals, who alone can insure the commercial and military survival of the Republic. The second policy allows this body of nationals to take their place as an institutional part of a mixed constitution, without which a Republic suffers degeneration into Oligarchy and revolution. However, we have analyzed this at length elsewhere.³⁹⁰ Here we must merely state that suffrage, equal citizenship rights and free travel are most properly defended by the timeless maxim of the separation of powers. Respondent ought never to justify these under a licentious doctrine such as equal protection.

THAT THE ARISTOTELIAN NATURE OF EQUAL PROTECTION REFUTES MARX'S ACCUSATIONS OF CAPITALIST CLASS-BASED JURISPRUDENCE.

We now glance briefly at Petitioner's claim that Respondent's system amounts to the rule of the strongest. Respondent insists that this allegation is essentially that of Marx, who complained to the capitalist states, "your jurisprudence is but the will of your class made into a law for all."³⁹¹ Within the same generation that Marx wrote this, the United States adopted the Fourteenth Amendment equal protection clause, which required geometric proportionality of all laws, making the 'will' of any class

³⁸⁹ Machiavelli, *Discourses*, Book I, Chapter VI.

³⁹⁰ *The Sophomoric Discourses*, Book VI, Chapter III. "The strength of a state or a revolutionary movement depends directly on the strength and energetic character of the people." Also, Book VI, Chapter IV, "state power is a unification of the wills of its members," and Book VI, Chapter V, citizens must "be dynamic and active, and their impulses must be augmented by the incentive force of liberty, but kept in check by the restraining force of law... The most effective bridge [for which] is found in representative layered governments."

³⁹¹ Marx, *The Communist Manifesto*, Part II.

irrelevant to statutory constitutionality. If equal protection is Aristotelian distributive justice, then ‘class will’ itself becomes an unacceptable basis for a law, and it becomes impossible to assert that American jurisprudence is that of any particular class. It is a fact that equal protection applies to all laws and all persons. Hence, Marx might have asserted that the actual application of American jurisprudence reflected the will of a class, but no longer could he say that the jurisprudence itself reflected a class will. Moreover, the biased application of law is nothing other than the perverted rule of the few, i.e. Oligarchy, about which we have been concerned all along. It ceases to be a Marxist question, but rather becomes a general question of preventing the selfish will of any one element from tyrannizing the others. For this reason, the separation of powers answers to the danger that Marx attacks, for insofar as it pits the one, the few, and the many against each other, it acts to prevent any economic class from dominating the others. The fact that American jurisprudence relies upon a separation of powers proves that it is not the will of any class in particular, but rather the will of every class not to be dominated by any other.

However, it is obvious that Marx actually wants one class to dominate others, but he would like that class to be the proletariat rather than the bourgeoisie. He says that the “immediate aim of the communists is...formation of the proletariat into a class, overthrow of the bourgeoisie supremacy, and conquest of political power by the proletariat.”³⁹² Thus he proposes replacing one Oligarchy with another, which entails the very ‘jurisprudence based on the will of a class’ that he condemned when allegedly practiced by others. This is neither the first nor the last instance of Marx contradicting himself. But since he has taken both sides of the issue, let us merely note that he is wrong in both; American jurisprudence is not class-based, as equal protection proves, and the will of a minority, proletariat, bourgeoisie, or otherwise, must never be given unrestrained political power if liberty is to survive.

Therefore, we agree with Respondent that the United States’ system of justice is not class-based within Marx’s meaning and hence does not represent the rule of the strongest in that specific regard. We disagree, however, with Respondent’s description of Petitioner’s claim as a mere accusation of Marxism. It only has this irrelevant Marxist dimension. We therefore will not allow Respondent to evade the Petitioner’s claim by setting up the bogeyman of Marxism. Our distaste for Marxism will not be made into a shelter for Respondent’s alleged injustices.

THAT EQUAL PROTECTION IS A SUBSET OF DUE PROCESS

Petitioner claims that since we have held due process to be indeterminate and unjust, we must say the same of equal protection, since the two are actually the same thing. We do not agree that they are identical, in spite of their extreme resemblance. We have noted that the underlying principle of equal protection is Aristotle’s distributive justice, mandating geometrical proportionality in legislation. We have also discussed due process in its substantive and procedural permutations. We fully realize that the concepts ‘due process’ and ‘equal protection’ are somehow the same. This puzzling similarity has been noted clumsily in case-law, but it is clearly identifiable

³⁹² Marx, *The Communist Manifesto*, Part II.

through a deeper theoretical analysis. Let us begin with the case-law equation, however, for it most quickly convinces the impatient, and then proceed to the theoretical analysis which alone can convince the more astute and thoughtful.

The United States Supreme Court recently reiterated its long-held interpretation of the 14th Amendment's due process clause in *County of Sacramento v. Lewis*, where it stated:

Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action: 'The principle and true meaning of the phrase has never been more tersely or accurately stated than...in *Bank of Columbia v. Okely*,...[where Justice Johnson explained as follows.] 'As to the words from Magna Charta...the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'³⁹³

Thus, the court reminds us that due process is violated by arbitrary government actions, which in the legislative context are violations of distributive justice, and this is really equal protection, as we have already seen. Therefore, due process *includes* equal protection, and the vagaries of the one infect the other. This is actually true, as will become clear from a theoretical explanation of the relationship between due process and equal protection.

Theoretically, due process and equal protection are similar insofar as both proscribe arbitrary government action, the former generally, and the latter specifically in the legislative context. Arbitrary government action is intrinsically not 'due' process but rather arbitrary process, and legislation without geometric proportionality is arbitrary legislation and thus violative of equal protection. Upon this analysis, equal protection indeed appears to be a subset of due process, namely that part of due process which relates strictly to legislative action.

If an opposition, however, between proportion and arbitrariness can be identified, then due process and equal protection might become synonymous, since both would share the same opposite, namely arbitrariness. Such a finding, however, would not only place equal protection within due process, but would also place corrective justice therein, since this type of justice is a type of proportion as well, namely an arithmetic proportion. This inclusion of arithmetic proportion under due process is more likely the case, because if geometric proportionality is not arbitrary, owing to its use of a fixed principle of equality, then neither is arithmetic proportionality. They both avoid arbitrariness in the same way, namely by observation of a proportional mean. This analysis requires us to admit that due process contains both types of proportionality, corrective and distributive. Hence, due process is actually what Aristotle termed 'particular justice', the term which he subdivided into corrective and distributive justice, the latter of which forms the American equal protection doctrine. The United States Supreme Court was therefore correct in its groping hunch that due process contained

³⁹³ *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1716 (1998) (Citing and quoting from *Hurtado v. California*, 110 U.S. 516, 527 (1884) (Citing and quoting from *Bank of Columbia v. Okley*, 17 U.S. 235, 4 Wheat. 235, 244 (1819)).

equal protection, but it lacked the theoretical framework which proves it. This we have supplied.

There is, however, a more licentious interpretation of equal protection which brings it yet closer to due process. The 'fundamental rights' strand of due process jurisprudence protects certain rights fundamental to all persons. These rights could equally be articulated as penumbral rights emanating from the equal protection clause, since as laws they treat similarly those similarly situated. As for fundamental rights, all persons are treated the same, and all persons are members of the class in question. There are still four variables as in distributive justice, and the proportion still holds, namely 1:1::1:100, where the second and last terms are the qualitative measures of people. Admittedly, this is an awkward angle from which to view equal protection, but it makes the point nicely that due process and equal protection exist in a very close orbit. Therefore, we agree with Petitioner that due process and equal protection are very similar, but we do not find them identical, and we will not condemn the one on a rationale derived by analysis of the other.

THAT THE AMERICAN FEDERAL GOVERNMENT IS NOT ACTUALLY COMPOSED OF DONATED POWERS FORM PRE- EXISTING SOVEREIGN STATES

According to Respondent, the residuary powers retained by its states, which themselves pre-existed the federal government, prove that the federal constitution is neither unlimited nor indeterminate. We disagree. The American states are officially characterized as predating the federal government, exercising sovereign power once as independent states. Federal power is allegedly formed of gifts from these states, which retained all powers not so given. This theory forms a basic tenet of American federalism: limited, enumerated federal powers on the one hand, and state residuary powers on the other. On closer inspection, this is a complete misconception with regard to all but four states, these being North Carolina, Rhode Island, Texas, and California. The reasons have been set forth by Cooley, who noted that the thirteen colonies were subject to the jurisdiction of the crown of Great Britain, being thus non-sovereign, until the national power was assumed by the Congress of 1775-76. This body thereafter exercised the sovereign powers of nationhood over the colonies, including those of war, treaty-making, and the exercise of admiralty jurisdiction, until it was dissolved by the creation of the Federal government in 1787. The states were thus never independent sovereigns in the family of nations, but rather were continuously subordinate to a higher sovereign power before, during, and after the revolution.³⁹⁴ Full sovereignty, it will be recalled, is the plenary power of governance above which there is no political superior. Such sovereignty was never exercised by the colonies during the revolution or under the Articles of Confederation, and their independent powers can only be termed sovereignty by construing partial, even substantial, submission to a superior government as equal to sovereign independence.

The new constitution of 1787 dispensed with the Confederate government. But it required ratification, however, and this was initially refused by North Carolina and Rhode Island. The prior national government being dissolved, these two states be-

³⁹⁴ Cooley, *A Treatise on Constitutional Limitations*, Chapter I.

came fully sovereign for the duration of their refusal. Upon their ratification, they became the only states to have entered the union from a prior period of perfect sovereignty. They did not pre-exist the federation, rather they briefly co-existed with it. As to the other eleven original states, such perfect independent sovereignty is totally fictitious.

The cases of Texas and California present two more exceptions to the general fiction of prior sovereignty, since these states co-existed with the Union prior to their entry into it, having formed themselves into sovereign Republics. As for the thirty three states admitted under the Northwest Ordinance, their powers were by that instrument entirely *handed* them by the federal government.³⁹⁵ Two states, Alaska and Hawaii, were created ad-hoc by the Federal government. Thus, in actuality only four states ever existed entirely apart from the federal government. Eleven partially pre-existed, and thirty five derived entirely from the federal government.³⁹⁶ Strictly speaking, no state ever pre-existed the Federal government as an independent sovereign nation.

This would imply that only four states freely joined the federation. Paradoxically, this too is wrong. Although only four states appear to have joined the Union from a position of equal and separate sovereignty, we must recall that they were the final entrants to a group powerful enough to crush them in the event of their refusal, and thus their consent was subject to more implicit coercion than any of the original eleven ratifying states. Currently, forty-six states may pretend to a fictitious origin, but the four true sovereigns likewise pretend to a fictitious consent. Indeed, the continued obstinacy of Rhode Island, all the more absurd for its size, would certainly have been rewarded with an eventual invasion by the United States. Skeptics need only look at the multiple invasions of Canada, Florida and the Indian nations to form a strong conclusion regarding the fate America had in mind at that time for contiguous territories.

At the very least, the consent of these four to the federation was not motivated purely by the desire for international protection, but also from the threat the Union itself posed, a species of consent addressed earlier in our analysis of the pure and corrupted forms of federations. Such a threat was sure to emanate from a league whose power far exceeded the combined force of those refractory states. For Rhode Island and North Carolina, the remaining eleven states certainly constituted such a threat. The recurrent provisions in the Articles of Confederation for ratifications and agreements by nine out of the fourteen British colonies in North America, Canada included by Article Eleven thereof, confirms that the founders believed that such a union, even if composed of the smallest nine, constituted a self-sufficient confederation, a fact which strongly implies that these nine would be economically and militarily preponderant to the remaining five.³⁹⁷ This being the case, the coercive power of an eleven member union would have been formidable indeed. Texas would have faced a confederation of twenty-seven adversarial states had it remained independent, and California, thirty.

³⁹⁵ *The Northwest Ordinance*, July 13, 1787. (Particularly in the title and paragraphs 1-5.)

³⁹⁶ In the Year 2000 A.D., there were fifty States in the United States of America.

³⁹⁷ See Madison's treatment of federal security in *The Federalist*, No. 43, where he reiterates the sufficiency of nine states.

Thus, in no case did any state freely consent to enter the American federation while exercising perfect sovereignty. We therefore hold the pre-existing state powers doctrine largely fictitious in principle and completely subverted in fact by the current structure of Respondent's government. We refuse to allow Respondent to interpose this fictitious doctrine in an effort to offset their own wrongdoing in rendering their constitution indeterminate. We do not, however, mean to imply any potential injustice in the history we have outlined above; our holding is merely that this history does not provide the justification and indemnity Respondent presently seeks.

THAT THE DELEGATION THEORY OF LEGISLATIVE POWER DESTROYS THE CONSENT BASIS OF THE MIXED AMERICAN CONSTITUTION.

Petitioner claims that Congress' ability to delegate important lawmaking duties to agencies immune from the ballot box reduces the people's governmental role and is thus unjust. We agree. This practice erodes the harmonic constitution's democratic element, which works mainly through elective consent. When the legislature places its powers beyond this consent, it commits a grave injustice, violative of the mixed constitution. The primacy of consent in the United States constitutional structure gives rise to doctrines circumscribing Congress' ability to delegate its lawmaking power. Such delegation was initially viewed by the courts with skepticism, but by the New Deal era of the 1930's, under severe executive pressure, the Court relaxed its delegation doctrine and permitted Congressional delegation of lawmaking power so long as pursuant to any intelligible guidance principle. In the court's words, delegations would be constitutional so long as Congress "lay down by legislative act an intelligible principle to which the person or body authorized is directed to conform, [whereupon] such legislative action is not a forbidden delegation of legislative power."³⁹⁸ This formula destroys the separation of powers by negating the role of consent, which forms, as we have seen, the mechanism of Democracy and thus represents the popular component of the mixed constitution.

Locke postulated that the illegitimacy of delegation rises from the inalienable sovereignty of the individual:

The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others... And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative... can be no other than what that positive grant conveyed,

³⁹⁸ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). Admittedly, this was five years before the New Deal. However, the doctrine blossomed during the agency-making frenzy of Roosevelt's New Deal.

which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.³⁹⁹

As Locke's words clarify, Respondent's delegation formula injures the harmonic constitution, and we therefore deem it unjust.

THAT ONLY PERIODIC AND ENDLESS CONSENT CAN LEGITIMATE GOVERNMENT ACTION

Respondent demands an explanation regarding why its delegations, made by elected representatives of the people, violate the people's consent. To understand the constitutional flaw of delegated power, we must revisit our prior inquiry concerning the governmental role of consent. Consent is the mechanism of the democratic or 'popular' constitutional element, as we have seen. Delegations raise the question as to what structures afford politically effective consent.

Consent can be direct or indirect. If direct, the people vote on proposals. If indirect, they elect representatives to do it for them. There is a third type of consent, where the people elect representatives who delegate authority to third parties. These third parties then make law. This is quite indirect, for the lawmakers are not themselves elected. They are appointed by the elected. Under such systems, popular consent is highly diminished. Such a system can be styled 'ancestral consent', to emphasize the remoteness of the popular mandate from the actual legislative power. It may be very ancient consent, or merely a delegate's further delegation. Hobbes believed that such consent justified establishing an absolute Monarchy. In Hobbes' model, a single generation's consent was sufficient to create a legitimate absolute power over all subsequent generations.⁴⁰⁰ Hobbes described the resulting governmental entity thus:

The only way to erect such a common power [of civil government is for the people] to confer all their power and strength upon one man, or upon one assembly of men,...and therein to submit their wills, everyone, to his will, and their judgments, to his judgment...as if every man should say to every man, I authorize and give my right of governing my self to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner⁴⁰¹....[such that] everyone, as well he that voted for it, as he that voted against it, shall authorize all the actions and judgments of that man or assembly of men in the same manner as if they were his own, *to the end*...[And the people,] being thereby bound by covenant to own the actions and judgments of [the established] one, cannot lawfully make a new Covenant [of government] amongst themselves to be obedient to any other, in any thing

³⁹⁹ Locke, *Second Treatise of Government*, Chapter XI, § 141.

⁴⁰⁰ Hobbes, *Leviathan*, Part II, Chapter XVII-XIX.

⁴⁰¹ Hobbes, *Leviathan*, Part II, Chapter XVII. (Original italics removed)

whatsoever, without his [official] permission. And therefore, they are subjects to a monarch, *and cannot without his leave cast off Monarchy.*⁴⁰²

Hobbes' formulation represents the most extreme form of ancestral consent, whereby a single generation's consent irrevocably binds the subsequent generations to abject and perpetual obedience. This is yet a form of consent, although it fails to achieve the ends which make consent necessary in the first place. To better see this shortcoming, we must recall the ancients' conclusion that ideal government is of the wise, which being impracticable, must necessarily employ the device of consent, so that the few wise may control the innumerable masses, and so the masses may verify and insure the wisdom of the wise leaders. Consent serves this vital purpose, but Hobbes' ancestral consent does so only once, at the outset, after which the instabilities of the pure constitutions return and continue unchecked, inevitably bringing corruption and revolution. Such minimal consent is insufficient to support a durable government.

To answer our Petitioner's claim that the diminution of their consent power is unjust, we must determine how much consent is needed to guarantee the rule of the wise, such that wisdom is practically able to rule, that it is practically able to rule, and its quality adequately verified and insured by the people.

In our discussion of justice in theory, we recognized that consent is the conduit whereby individuals entrust their sovereignty to agents. In the derivative field of political action, however, consent can be seen as so many delegations of power. In the context of delegation, the agent described above is the original delegate of the individual's sovereignty. Thus, consent legitimates delegation of power, and where consent diminishes, so does legitimacy.

In sub-delegations of delegated power, legitimacy is therefore confined to the terms of the original delegation, and the subsequent delegation is usually *ultra vires*, beyond the terms of the original consent. In such cases, the axiom applies, *delegatus non-potest delegare*.⁴⁰³ (A delegate cannot delegate.) Only when such a delegate or sub-delegate is exposed to a popular election is the consent factor reintroduced at his level and the legitimacy of the delegation reestablished. Parenthetically, those familiar with contract law will see that these same problems of sub-delegation appear in the assignment and delegation of contracts. These doctrines attempt to protect the consent of contracting parties just as political consent protects the democratic element.

The original consent, the power of the individual temporarily to divest himself of his sovereignty, is limited by the principle of sovereignty's inherent inalienability, which derives from the fact that humans are conscious, volitional beings. Since consciousness is inalienable, so finally is an individual's ultimate sovereignty over themselves. Since such sovereignty is inalienable, it may be lent, delegated or enlisted in someone else's cause, but not permanently. There will always be some ultimate individual power of self-sovereignty. Systems that do not accommodate this fact will be destroyed by it. Such unrecognized sovereignty will fester and boil beneath the surface of any constitution which ignores it. There is a point at which delegations put power in hands so remote from the consenting citizen that just such a situation arises.

⁴⁰² Hobbes, *Leviathan*, Part II, Chapter XVIII. (Italics supplied)

⁴⁰³ 2 Inst. 579

The political system will have seemingly alienated individual sovereignty, an impossibility which introduces great instability to government.

What level of power must an individual retain over his delegated sovereignty in order for it to remain unalienated and government to remain stable? If it is *his* power, ultimately, he must exercise sufficient control over it. Property principles suggest that his authority must at least rise to the level of a power to exclude others. If a delegated or sub-delegated power is to be thus remotely controlled, the individual must have the practical means of excluding the agent or sub-agent from continuing to exercise the delegated power. This exclusion could be a periodic veto over the agent's use of the power, or it could rise to the strength of an at-will revocatory power. The former is the least consensual, the latter, the most. The former power will therefore feature the lowest degree of legitimacy, the latter, the highest. However, the optimum practicality of government will be found between these extremes, since government based on the former power will be excessively licentious, (the malady which plagued the ancient ideal of government by the allegedly wise), and government based on the latter power will be the anarchic rule of the ignorant.

Thus, the optimal mechanics of consent should consist of more than an occasional negative over an agent's use of delegated power, but should not rise to the level of an at-will power to revoke the delegation. To exceed the former, a positive power to decisively prescribe and influence the use of the delegated power is required. To avert the difficulties of the latter, such positive influence must be only periodic.

To be periodic and yet not destroy the attributes of ownership, a principal's consent must occur more than once, for a single instance would not be periodic. Nor would a double act indicate a period. Only upon the third exercise can a period be deduced, being the average of the intervals between exercises. Yet, if the exercises were limited to three, the power would cease to be under the control of the principal after the third use, and such power would fail to have been infeasible. The final exercise, at whatever interval, would constitute a permanent alienation of individual sovereignty and instability would result. Thus, such exercises of consent must be unlimited in number. They must be potential throughout the life of the individual. This is not to say that they must be exercisable at all times, merely that they must by periodic without end.

Thus, for government power to be optimally legitimate, it must be subject to the consent of the governed periodically without end. This admits that there is a paradox of legitimacy, namely that a government must not be entirely illegitimate, without any consent, and equally must not be perfectly legitimate, subject to infinite consent, if it is to be successful over the long term. This paradox can be concealed by denominating the middle position the 'optimally legitimate' amount of consent. This term, however, merely hides the fact that if legitimacy is to mean strict accordance with the popular will, then legitimacy is a political extreme in need of moderation. This idea violently conflicts with untutored notions of consent of the governed, self-determination and governmental legitimacy. This is the political intersection of natural right and utility.

The existence of a continuum between absolute legitimacy and illegitimacy, wherein one will find a point both legitimate enough to be truly consensual, and illegitimate enough to be practically effective, is another way of describing this paradox. Nevertheless, it is a depiction which renders the debate more tangible, as some institutions will tend towards the extreme of illegitimacy, and others to the opposite

extreme of perfect legitimacy. Either extreme is dangerous to public liberty and governmental stability. However, if we require legitimacy to mean the perfect consent of the people to everything, then the democratic element of the mixed constitution will destroy the other two, and the separation of powers will be destroyed. Moreover, if political right is based solely on consent and wisdom is barred from the calculus of legitimacy, the popular policy becomes legitimate, howsoever stupid, and the unpopular policy, illegitimate, howsoever wise.

This is an unworkable idea of legitimacy. Thus, the paradox of political legitimacy is actually a description of the dysfunction of modern political legitimacy, being based purely on consent. Much better is a definition of the legitimate as theoretically a blend of wisdom and consent, and institutionally, the interaction of the mixed powers, none having a predictably overpowering influence on the result. This is yet another way to express what we said earlier about the genius of the Republic, namely that *without both wisdom and consent*, there can be no enduring legitimate sovereignty in any political context.

Therefore, having identified the practical operation of consent in the mixed constitution, it becomes clear that permanent delegations of Congressional power which merely 'lay down by legislative act an intelligible principle to which the [delegate] is directed to conform,' violate the need for consent to be periodic and endless. Respondent's Supreme Court delegation formula destroys the separation of powers by negating this role of consent, which forms, as we have seen, the mechanism of Democracy and thus represents the popular component of the mixed constitution. We hold for Petitioner that Respondent is unjust in this respect, as they are impairing their democratic element and upsetting the balance of the harmonic constitution.

THAT THE DANGER OF LEGISLATIVE DELEGATION ARGUES IN FAVOR OF A LEGISLATIVE VETO

Petitioner argues in the alternative that, supposing the Respondent's Agency delegations are just, then Respondent's refusal to tolerate a legislative veto on acts performed by such delegates is certainly unjust. We agree. The delegation theory of legislative power is politically ruinous, and having been adopted, Respondent's Court has foolishly required that the work done by these delegees be free from legislative veto. A legislative veto power is when a legislature gives law-making power to an agency but reserves a right to veto its laws. This veto is said to violate the principles of presentment and possibly bicameralism, as the legislature is empowered to essentially make new legislation, in a negative way, without the president's veto, by striking down the administration's use of delegated power on a case-by-case basis. The United States Supreme Court opined that delegations could not be provisional, but were all or nothing, and that recapturing or influencing delegated power required new legislation and could not be done by means of a legislative veto.⁴⁰⁴ This goes almost as far as Hobbes' contention that a person's sovereignty, once delegated to the leviathan, is irrevocable. Such irrevocable delegation is abhorrent to the concept of popular government, wherein government is the people's agent and may be replaced

⁴⁰⁴*Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d. 317 (1983).

if it fails to honor their interests.⁴⁰⁵ It is *ex-ante* unjust for the government to delegate and thereby evade *particularized* bicameral passage and executive presentment. Having allowed this power notwithstanding, it is a glaring absurdity to require the delegation to be irrevocable but by legislative alteration, as this renders it even more irresponsible than before. We have already analyzed the role of consent in legitimating governmental delegative action. Optimal legitimacy requires the consent of the governed ‘periodically without end.’ This necessity applies to the presentment requirement by requiring Congressional presentment to the executive of each particularized law, for such is the limitation which legitimacy places upon delegations. In reality, every act of every agency, if legislative, ought to be subject to bicameral passage and presentment to the President.

In rejecting a legislative veto, Respondent has also violated the principle that greater powers include their lesser powers; it is absurd to argue that delegation of the whole does not include delegation of the part. It also violates the notion that one may not delegate that which one does not have, since the Congress does not have the power to make rules without presentment and bicameral passage. It could not make a law rendering itself thereafter lawless, even if such were bicamerally passed and signed by the executive. Thus, it is absurd to think that the Congress could do just this by delegating to an agency a power of mainly unchecked rulemaking. Petitioner’s allegations of injustice are correct in these respects.

THAT THE THREAT OF PUBLIC LAWSUIT ALSO OPERATES TO IMPAIR THE CONSENT MECHANISM OF THE PEOPLE.

Respondent has asked us to mitigate our findings of injustice since Petitioner had opportunity to petition the government and seek a change in the death penalty law but never did, thus forfeiting her own political say in the matter. Petitioner insists, however, that she was unable to seek such redress as many supporters of the regime threatened to sue her privately if she did, and that such lawsuits would have destroyed her estate and rendered her family financially helpless. We believe that Petitioner’s failure to seek a change in the law was coerced by threat of private lawsuit and thus cannot be used against her.

In addition to the many public dangers we have mentioned, there is a private danger to the mechanism of consent, namely that the threat of lawsuit may prevent bona-fide petitioning of the government for redress of grievances. This danger was noted by Pring, who identified a category of lawsuits answering to this anti-democratic purpose and labeled them SLAPPs, or, strategic lawsuits against public participation. Pring explained that a SLAPP involves, “communications made to influence a government decision or outcome, which...resulted in a civil complaint or counterclaim, filed against non-government individuals or organizations...on a substantive issue of some public interest or social significance.”⁴⁰⁶ These tend to destroy the people’s consent power. They intimidate citizens into foregoing their rights to every species of political activity involving consent. A lawsuit can be misused by a

⁴⁰⁵ Locke, *Second Treatise of Government*, Chapter XI, § 139.

⁴⁰⁶ Pring, *SLAPPs; Getting Sued For Speaking Out*, Chapter I.

private party to intimidate and coerce others in “all means of expressing views to government, reporting violations of the law, testifying before government bodies, writing letters, lobbying legislatures, advocating before administrative agencies, [and] circulating petitions...”⁴⁰⁷ For example, a developer may sue a citizen for imploring a city council not to permit a certain construction project to go forward, alleging defamation or interference with contract, for example. This is a classic SLAPP, but there are many others for all kinds of petition activity. Under the 1st Amendment’s petition clause, all citizens have a right to petition government for the redress of grievances. This right exists in order to guarantee the healthy operation of the constitution’s democratic element. SLAPPs directly prevent the exercise of this right. Therefore, a state must not permit its private citizens to interfere with these consent related activities by strategic use of lawsuits, lest it eventually demolish the operation of the democratic element of its harmonic constitution. Since Petitioner’s failure to seek a change in the law was coerced by potential SLAPP lawsuits, we cannot grant Respondent any mitigation for the alleged democratic-ness of its execution law.

THAT THE DEMOCRATIC ELEMENT OF THE CONSTITUTION CAN BEEN FATALLY INJURED BY THE INCREASE OF MONOPOLISTIC AND ANTI-COMPETITIVE ECONOMIC PLAYERS

Petitioner next alleges that she could not have possibly consented to the injustice inflicted upon her by the Respondent, due to the fact that the Respondent’s antitrust, or ‘competition’ laws have advanced aristocratic power beyond any possible check or balance and thus fatally diminished the ability of the people to exercise consent. Petitioner insists that the aristocratic financial elements of the United States have effectively co-opted or eliminated the consent power of the people, and thus, her alleged consent is an impossibility. Petitioner’s claim is, in essence, that the health of the Respondent’s democratic element has been injured or destroyed by increased aristocratic, monopolistic and anti-competitive economic players.

In order to address this claim, we must consider whether and how Democracy can be augmented or compromised by capitalism and the effect of economic regulation, especially antitrust statutes, on that result. First, let us review what we have already stated about Democracy. In short, Democracy is the rule of all, as opposed to the rule of some, which is termed Aristocracy, and the rule of one, which is Kingship. When these basic schemes are mixed, Democracy becomes but one element of the constitution, the popular or democratic element. The elements of Aristocracy and Kingship are coextensive with the government itself, Kingship equaling the executive power and Aristocracy, the legislative and judicial powers. This is the harmonic constitution. How democratic a nation is depends on the power of the popular element in relation to the others. The popular element usually participates in government only by exercising elective choices and forming customs. These activities are species of consent, which forms the political mechanism of the democratic element in a mixed constitution. Thus, the degree to which a government is democratic is analogous to

⁴⁰⁷ Pring, *SLAPPs; Getting Sued For Speaking Out*, Chapter II.

the efficacy and purity of the people's power to consent. When we analyze the impact of the Respondent's antitrust laws on Democracy, we are therefore required to address their impact on the people's real power to consent freely. Let us look at these relationships more closely.

THAT THE DEMOCRATIC ELEMENT ITSELF OPERATES IN LEGISLATIVE, ADJUDICATIVE, AND EXECUTIVE WAYS

The people in their collective actions form the democratic element of the mixed constitution. If there is any democratic element at all, the people at least somewhat rule themselves. This self-government can be characterized in functional terms, for in daily life people act either legislatively, adjudicatively or executively. For example, the people act legislatively when they form customs and usages which are distilled into common law; they pursue executive activities when making citizen's arrests and bringing suit under statutes authorizing 'private attorneys general', or when policing themselves to obey the laws generally. And finally, the people display adjudicative conduct when they elect government officials, serve on trial juries, and enter voluntary transactions like buying and selling. But these examples do not tell the whole story. Therefore, let us look more deeply at how the people individually rule themselves by exercise of these functions.

We have already examined how the people elect government officials. We called it consent and noted that legitimate sovereignty depended on such consent. We also noted that such consent was a practical necessity, for without it the few government officials could not hope to rule a multitude of people that naturally outnumbers them, nor could the people insure the merit of the officials. We have now altered our perspective, as we are viewing the consent mechanism itself as a species of adjudicative behavior, exercised by the people.

Indeed, we are now applying the functional separation of powers to the non-government portion of society. This is novel at first, but it makes perfect sense, for insofar as Democracy obtains, the people rule themselves, and how they rule is necessarily by legislating, adjudicating, or executing laws on their own. To the extent society is democratic, the people are self-ruling, and in this sense they are their own government, and that self-government is subject to the same functional separation of powers analysis as any other government. In the democratic case, the powers of adjudicating, legislating, and executing are all possessed by the same entity, namely the individual person. We have noted that this mixture of powers motivated Kant to call Democracy tyrannical, for in it, the legislator is also the judge and executioner.⁴⁰⁸

Kant's condemnation is not to be taken as correct in every case, for there are many instances where this democratic 'mixed-power' or 'tyrannical' rule of each person on his own behalf is best. It is most beneficial where the individual has the most wisdom in the matter to be decided; and this wisdom usually flows from their superior information about the matter in question. This is enlightened despotism of individuals over themselves; and no adverse impact results on the human character from this form of enlightened despotism. It is in these areas that Democracy is not only acceptable but laudatory. Wherein the individual is most wise, the individual should rule. This is

⁴⁰⁸ Kant, *Kant's Political Writings*, Perpetual Peace, Section II.

to say, where the individual is the wisest, Democracy should obtain. This is roughly a Meritocracy, but one in which all people are deemed meritorious by virtue of their individual wisdom regarding matters relating to themselves. For instance, if the question is, "Where does it hurt?" the injured person is normally the best qualified to answer. The individual is the wisest regarding the dimensions of their own pain. This is because the individual has more information about it than anyone else. Thus, in matters such as where it hurts, a true Meritocracy is pure Democracy.

Democracy, or the democratic element, then, should prevail wherever the individual is wisest. If there is a field where the individual is wisest but nevertheless is not allowed to rule himself, then the rule of the less wise supervenes. This usually will lead to wrong decisions, and injustice will be the natural result. To exaggerate for the purpose of clarity, if someone else is allowed to decide 'where it hurts', they may amputate the wrong leg.

Now, there are fields in which the most wise must nevertheless be precluded from ruling, due to their selfish nature. Although an Aristocracy may know better than the masses about which tax policy produces a better state, they are self-interested and will usually adopt a damaging tax policy because it preserves their own personal fortunes. Likewise, a criminal defendant is undoubtedly the most wise regarding the question of his own guilt. He knows better than anyone else, so long as the law is clear. Yet, we cannot rely upon criminal defendants to judge themselves, for if they are guilty their selfishness will often prevent their honesty. Instead, we require others with less knowledge to rule. The judge and jury have less knowledge than the defendant, but due to the selfish nature of humanity, we know that the rule of the individual in this case will not result in justice. Pure Democracy cannot govern the courtroom. Here, as in the taxation example above, the most wise must necessarily be precluded from ruling by themselves.

Admittedly, we are assuming that the wise in these cases are not really wise as to what is truly good, for as Plato said, nobody willingly errs; each pursues what they truly believe is good in the way they conceive it.⁴⁰⁹ Thus, we are actually saying that when the wise regarding some particular are not wise as to some broader truth, their right to rule diminishes. Another way to express this limit to Democracy is that when knowledge of a fact does not result in wisdom for want of some other knowledge of some other fact, then such knowledge cannot support a right to rule, assuming that wisdom carries a right to rule, which it does wherever such rule is practicable. There are cases where individuals simply do not know what is best for themselves, though they insist otherwise. In these cases, those who know best should rule, if they can be reliably identified and their knowledge verified.

Let us look now at what fields are naturally fit for democratic rule. In what areas is the individual likely to be wisest? They are likely to be wisest about their own state of mind. If they are sad, they will know it more certainly than others. If they like something, they will know this more readily than will we. If they dislike something, they will be the first and best witness of the fact. The individual is always the best judge of what he or she values, to what extent and with what gravity. This is not to say that the individual's valuations are themselves wise, but only that the individual's knowledge of these valuations is better than anyone else's. Their likes and dislikes

⁴⁰⁹ Plato, *Timaeus*, 86 E, *Protagoras*, 345 D, and *Laws*, 731 C.

may be foolish, but they still will be the wisest reporter of what those likes and dislikes actually are. Now, since the individual is always the best judge of what he or she values, democratic rule should govern situations in which individuals determine this value. This rule is really adjudication by the individual, as each ‘judges’ the value of things, for as we said, insofar as a person rules themselves, they do their own legislating, executing, and adjudicating. A brief look into the nature of the decision reveals it to be adjudication, for it is a decision about past matters applicable to only one person. Thus, wisdom of individuals as to their own values requires that individuals should do their own adjudicating regarding the value they place on things.

It is worth a pause to note that the adjudicative and executive activities, in the case of individuals ruling themselves, are actually types of cognition and volition respectively. This explains why two measures are employed in determinations of legal insanity. A person is deemed legally insane if they cannot perceive the difference between right and wrong, or if perceiving such, they still cannot bring themselves to act in accordance with their knowledge.⁴¹⁰ The first of these two alternatives is a cognitive disability, the second, a volitional one. They correspond to two of the ways a person can rule themselves, through adjudication and execution. Thus, deliberative cognition is adjudication, and volitional action is execution. Thus, the choices and deliberations of individuals as to their own values is adjudication; and the fact that the individual is wisest in such adjudications requires that individuals should do their own adjudicating regarding the value they place on things.

This comports with the ideal of intellectual toleration, which as Locke noted, contains the principle that no person can compel the belief of another, and therefore that no article of faith may be legislated.⁴¹¹ In Locke’s words, “...such is the nature of understanding, that it cannot be compelled to the belief of anything by outward force.” Thus, the correct function of the democratic element virtually requires freedom of thought. But it also supports freedom of valuing things other than thoughts, namely the physical things of the world.

Here, the discussion reaches a fork. If we pursue the freedom of thought path, we shall presently find that freedoms of speech follow as a necessity, as noted by Milton in his *Areopagitica* and by Mill in *On Liberty*.⁴¹² We will also note that this supports the power of the people to consent and thus is crucial to the healthy operation of the democratic element. If we pursue the freedom of physical valuation path, we enter the realm of laissez-faire economics. It is a dramatic fork, indeed. But it is critical to see that the individual wisdom regarding valuations supports both types of valuations, the metaphysical and the physical. An individual will know far better than anyone else what value he or she personally attaches to a particular knife, these eyeglasses, or that

⁴¹⁰ American Legal Institute, *Model Penal Code*, Article IV, Section I, stating in relevant part that “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks the substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.” (parenthetical in the original.) Such law varies by state in America. The *Model Penal Code* states the average or model provision.

⁴¹¹ Locke, *A Letter Concerning Toleration*.

⁴¹² Milton, *Areopagitica*, and Mill, *On Liberty*, Chapter II.

lamp. The individual is wisest in regard to such information, therefore, democratic rule must govern the recognition of such values.

Now we already stated that if selfishness induces dishonest articulation of these valuations then democratic rule is improper, as in the case of the criminal defendant. However, when materials are valued pursuant to an anticipated exchange, selfishness does not obscure valuations but rather renders them more dependable and clear. In an exchange, the valuation entails a personal loss. Therefore, selfishness will never let the value of a desired thing be intentionally overstated, nor the value of something to be traded away understated. Nor will the other party knowingly overstate the value of what they want or understate that of what they must sacrifice. The valuations pursuant to an exchange thus are not obscured or distorted by selfishness, but rather rendered clear and reliable. Thus, they are proper fields for the exercise of democratic rule. Exchanges should be determined by each person for themselves, although some exceptions could be made for mistake of fact. This is each person ruling on their own behalf. It is intrinsically, therefore, within the domain of the democratic constitutional element.

THAT THE FREEDOM TO SET PRICES, TO BUY AND SELL ACCORDING TO ONE'S OWN VALUATIONS, IS PROPERLY GOVERNED BY DEMOCRATIC PRINCIPLES

We have now established the idea that the freedom to set prices, to buy and sell according to one's own valuations, is properly governed by democratic principles. Each person should be free to make buying and selling decisions on their own, by themselves, liberated from the coercion of others who would set prices for them, be they government or market actors. Democratic rule is the principle upon which the market functions best. This is because only in such a market will the right quantity of the right goods be produced for the right price. A command economy, with a controlled or fixed market, will not be efficient, for it will lack the accuracy of supply and demand information necessary to produce and distribute things efficiently, to say nothing of motive. It will lack this information because those who have it are not allowed to rule on the issue of valuations.

If a central authority fixes a price, then the people who desire that item at a different price will either not buy it because they think it not to be worth the higher price, or they will buy more than they relatively want if its price is below what they think it is worth.⁴¹³ In either case, a fixed price will result in inefficiency. The real values and wants of the people will be deranged and ignored. The cost to society is that it will produce relatively less of what is really valued, whatever that happens to be. On the other hand, the free market allows individuals each to judge their own valuation, producing myriad market transactions which, in turn, tend to arrive at a more accurate measure of what things are valued most throughout society. This automatic price-setting function of the free market is referred to by Smith as the invisible hand.⁴¹⁴ The invisible hand of the marketplace sets prices and determines what will be

⁴¹³ Posner, *Antitrust Law*, Part I, Chapter II.

⁴¹⁴ See Generally, Smith, *The Wealth Of Nations*.

produced in what quantities. This is essentially democratic in nature, for it will be recalled that the rule of each on their own behalf is democratic.

From this conclusion, it is easy to see that price fixing and monopolies will destroy each person's ability to rule on the value of things. Thus, price-fixing and monopoly are anti-democratic. They essentially involve the rule of a few or the rule of one. This is particularly true with respect to monopolies of labor. To the extent that free markets prevail in commerce, Democracy prevails in commerce. Correspondingly, any diminution of free-market forces will automatically be a diminution of the democratic element. Business oligopolies as well as labor unions are in this way anti-democratic.

The free-market system, or the exchange mechanism of price-setting, can be roughly labeled competition. We have labeled it the adjudicative power of the people with respect to values. But we have merely traced its political nature, whereas it is more familiarly discussed in economic terms. Competition is more easily understood as an economic term since it often defines the healthy state a market. A competitive market is healthy because it is usually the most efficient market, and this is because of the enhanced incentive and information characteristics we noted above.

Unfortunately, there are cases in which the most efficient market is not the most competitive market, and this throws the analysis into a quagmire. If competition retards efficiency, some will argue that competitiveness must be preserved at all times, and others, that efficiency must be preserved. If the goal is to produce as many widgets as cheaply as possible, there may be circumstances when this is best done by a single monopoly. Such a system might be more efficient at widget production than a competitive system. Arguments about monopolistic sloth and abuse are easy to imagine, but they are also subject to intellectual challenge, since one can imagine an enlightened monopolist who guards against his own sloth as easily as imagining an enlightened despot in the political arena. It could happen, although we can assume that every monopolist will eventually become corrupt, just as will every Monarchy over time. But it must be conceded that when they are not corrupt, they may be, for a time, more efficient than a competitive regime at making a single thing as cheaply as possible. Some may argue that they will be inferior at dynamic change, as big firms are slower to innovate than small ones. This is usually true, but again, there will always be a possible exception where the big firm has taken special precautions to be extraordinarily innovative and keenly aware of market demand. Moreover, some types of innovation may only occur if the innovator is allowed a monopoly in return for the huge costs of innovation. So, clearly, not all competition is efficient, and not all efficiency is competitive. The question becomes one of choice or balance: efficiency instead of competition, competition instead of efficiency, or some balance of the two. Our earlier political analysis has made this fork even more clear; the choice is not simply efficiency or competition, but actually a choice between Monarchy, Aristocracy or Democracy.

Although American courts originally protected competition, they have come to prefer efficiency in their antitrust jurisprudence, and this choice has a potentially negative political side-effect. In the early days of the Sherman Antitrust act, preservation of competition was the primary objective, although it is not clear that any contradiction between competition and efficiency was recognized at that time. Likewise, the body of law dedicated to antitrust concerns in Europe is called 'Competition

law' (not efficiency law), hinting at its original bias in favor of competition and hence Democracy.

However, efficiency slowly come to dominate the judicial interpretation of anti-trust legislation, especially in America. Economic theorists often say that efficiency is good in every economic respect. They then declare that, insofar as antitrust legislation attempts to safeguard economic health, its purpose should be to safeguard efficiency. However, efficiency is not an economic good in every respect; and this is because efficiency is often a political evil.

Efficiency leads to political consolidation, and to the extent that economic policy favors efficiency, such consolidation is an inevitable result. This is clear when we recall that economic competition is an alias for the peoples liberty of market choice. The free-market conduct of the people is part of their democratic government over themselves, with respect to buying, selling, and price setting. To the extent that the people do not set prices, they lose the ability to govern themselves in that respect. There may be efficiency gains involved, but the political result is a loss of democratic power and an increase in aristocratic power. This political shift affects the separation of powers dramatically, and hence it may destabilize the political structure of the nation and ultimately result in revolution. If the elements of the constitution are in balance, a decrease in the democratic element of the constitution may destabilize the separated powers; of course, if it already exists in overabundance, a decrease may actually stabilize things. It is the normative nature of a balance that an overabundance of anything be avoided. It is important only to note the inherent political dimension of antitrust law, since antitrust law deals with economic markets, which are governed either by the people, by aristocrats, or by a single authority, and this governing is intrinsically political. This analysis proves that price-setting mechanisms are part of the political fabric of a state, and if these mechanisms are placed in the hands of an Aristocracy or the state, they will be denied to the people, who will lose a corresponding amount of liberty.

Now, one might easily conclude that the market should be governed entirely by democratic forces. This is a mistake for the same reasons that cause Democracy to fail as a pure constitutional format. The result would be anarchy and the market would founder for lack of cooperation. As we have seen, such wars of all against all are impossible, for people naturally cooperate upon selfish grounds. A pure democratic market is no exception. Partnerships and companies of all kinds will naturally arise, and the market prices will soon be decided not only by the people, but by various groups of people acting jointly or cooperatively. Aristocratic influences are thus a natural development in the marketplace. Some degree of this aristocratic influence will no doubt increase the efficiency of the market. There are some things a large public corporation can do that a small sole proprietor simply cannot. In some cases, a single firm or group may come to dominate one industry, which owing to the nature of things, is best handled as a natural monopoly. Efficiency will eventually dictate that there be these three competing influences, the popular, oligopolistic, and monopolistic, in the marketplace, and that the monopolies be restrained by government oversight. Thus, the economy and its players are best organized into separated powers just as are other political forces. The mixed rule of the one, the some, and the all must supervene in the marketplace for the economy to be a compatible aspect of a mixed constitution.

THAT EFFICIENCY CAN HAVE POLITICAL EFFECTS, AS THE ALLEGORY OF THE GUN ILLUSTRATES

Respondent attempts to rebut our conclusion by citing the ‘Chicago School’ theory of antitrust grounded in law & economics, which asserts that efficiency, as distinct from any political objective, is the only rational basis for antitrust analysis and enforcement. Indeed, we are aware of the popularity of this argument. We are still convinced, however, that efficiency and political objectives cannot be separated, since economic power can be easily converted into political power, as shown by the following hypothetical situation.

Imagine a Democracy of five persons. The majority rules on all issues. Nobody has weapons, but the group in common owns a single gun, which anyone may purchase from the group for \$1000. Next, assume that no person or group ever earns enough to accumulate \$1000. Finally, imagine that one citizen offers an invention for which he is granted a twenty year monopoly. The invention doubles the society’s efficiency and benefits each of the inventor’s fellow citizens equally. By charging an efficient and reasonable monopoly price, the inventor amasses \$1000 before anyone else can. He then buys the gun and rules the others as his subjects. His monopoly was efficient, increased the social wealth of each citizen, and produced a drastic political result. His economic monopoly was converted into a political monopoly.

Business combinations, monopolies and large concentrations of money are dangerous because the first of these to “buy the gun” can control all the others and destroy the democratic element of government. This is to say that wealth inherently entails the possibility of revolution.⁴¹⁵ The only possible objection to this model is that there may be no “gun for sale” in real states. Unfortunately, this objection fails, for every society has the proverbial gun for sale. The gun in the allegory symbolizes the power over government. In any constitution, when those with the power to determine the persons and policies of government are coerced in their choice, they lose that power. The coercive actor usurps it for himself. In a mixed constitution, the persons and policies of government are chosen by the people through the mechanisms of election and consent. Here, the power over government is fundamentally in the hands of the people, and this power must equal that of the government itself, as the ratios of the harmonic constitution make clear. When forces act to upset or coerce the exercise of consent, then the democratic element of the constitution wanes and Aristocracy grows in its place. The gun is the power over government. In a democratic state, this is consent. When one citizen can buy all the consent, he can dominate the government and turn it into his kingdom, and ultimately, his tyranny.

⁴¹⁵ Poverty, on the other hand, is a state of war. Therefore, the elimination of wealth itself is not a solution to the danger of revolution.

THAT STRICT ECONOMIC EFFICIENCY IS A SHORT-TERM EFFICIENCY, AND RESULTS IN LONG TERM INEFFICIENCY DUE TO ITS POLITICAL CONSEQUENCES, THOUGH IT MAY CURE A BRIEF EMERGENCY

The allegory of the gun shows that even seemingly beneficial economic efficiency can result in political revolution in favor of Oligarchy or Tyranny. Thus, strict economic efficiency, without more, is a dangerous and improper objective for a society wishing to preserve democratic characteristics. We must, however, make two further observations. The first is that oligarchic and tyrannical governments are grossly inefficient and tend to eliminate the economic efficiency that brings them about, if such efficiency in fact does bring them about. Thus, the allegory of the gun, when carried to its ultimate end, shows that strict economic efficiency is a self-defeating, short-term efficiency that will result in long term inefficiency due to its political consequences.

The second point is that to preserve a mixed constitution in emergencies, this strict economic efficiency may, in fact, be indispensable. It may serve as a temporary adrenaline to the body of the state, allowing a short burst of energy and productivity sufficient to overcome some sudden threat. But, like adrenaline, it is destructive of the body if relied upon perpetually.

THAT CONSENT CAN BE COERCED AND BOUGHT IN THE UNITED STATES

Respondent protests that the question remains as to how or whether anyone can actually buy consent in America. This we must therefore answer. How does one “buy the gun” in America? Consent in the case of the United States can be bought several ways. An individual can convert economic power into political power by:

1. Becoming an elected leader himself, funding his own campaign.
2. Electing his friends, funding their campaigns.
3. Converting the elected into his friends, directly by favors and contributions, or indirectly through political parties or organizations.
4. Converting the public into his friends, and having them elect his lieutenants, by subsidizing, coercing or convincing them, especially through advertising and media.
5. By relative diminution of the economic power of others, rendering them destitute of time and funds with which to exercise consent.
6. By privileged access to and abuse of the judicial system.

Only category five above can be accomplished purely by private economic activity. This occurred in the mid-nineteenth century and can be seen in the case of the subsistence wage-earner of the industrial ghetto, who had neither the time nor education required to make an effective exercise of political consent. Number four could be achieved substantially by economic conduct, but would seem to require a modicum of purely political action. For example, a firm which employed every citizen of the

country might exercise category four power, as it could coerce the political decisions of its employees by dire predictions and admonitions. Yet it would need to light a guiding political flame before their eyes in order to direct them towards its goals, and this would be purely political conduct. Number three above is the most efficient way of converting economic into political power. It preserves the division of labor between those who specialize in economic pursuits like business, and those who specialize in conventional political action, like legislators and bureaucrats. Category three is therefore the most prevalent form of politico-economic power conversion. Category two essentially creates the category three mechanism from scratch, being thus more expensive and time-consuming, but perhaps more reliable. It also requires a political expertise which is not always characteristic of successful business leaders. The first category is the most reliable, for it accomplishes an absolute control over some political power, yet it is only so valuable as the single position obtained. In an elective Monarchy, purchasing the single position of King is a valuable acquisition of political power. In a mixed constitution, becoming a self-funded Congressman may secure a quite useless degree of political power, since there remain thousands of other political actors beyond one's control, assuming no other category of economic-political power conversion has been used.

Therefore, the utility of category one is limited to positions of extraordinary power. It is also limited by the need for extreme political competence on the part of the purchaser, lest the purchase be rendered useless by offsetting political powers, as was the case of Emperor Didius Julianus, a rich Roman businessman who bought the Imperial throne from the elements of the Roman army known as the Imperial Praetorian guard. No sooner had he bought the Imperial purple than did the fickle guards tire of him and allow him to be executed. In Gibbon's words, it was...

The most insolent excess of military license...The Roman world was to be disposed of to the best bidder by public auction...[T]he purchaser...was declared emperor...[And] after the crowd of flatterers dispersed...he passed a sleepless night; revolving most probably in his mind his own rash folly...the doubtful and dangerous tenure of an empire, which had not been acquired by merit, but purchased by money...[However, a] new candidate for empire saw...the advantage of the situation...[The Roman general Severus advanced with his veteran troops upon Rome, agreed to amnesty for the Praetorian guards if they switched allegiance to himself, and forced the Senate to acknowledge him Emperor, which they did.] That assembly...pronounced a sentence of despotism and death upon his unfortunate [predecessor]. Julianus was conducted into a private apartment in the baths of the palace, and (A.D. 193, June 2) beheaded as a common criminal, after having purchased with an immense fortune, an anxious and precarious reign of only sixty-six days.⁴¹⁶

Such is the difficulty of category one power. It is useless to anyone but the politically astute. Since category three is the most prevalent and thus the most dangerous avenue for converting economic into political power, let us investigate this in more

⁴¹⁶ Gibbon, *The Rise and Fall of the Roman Empire*, Vol. I, Chapter V.

detail. Those with the financial means can convert elected officials and civil bureaucrats into their friends, directly by favors and contributions, or indirectly through political action committees, being associations which pool the resources of members for distribution to political causes. In doing so, the wealthy come to supplant the people, whose consent is no longer operative and has been replaced by the desires of the intervening plutocrat. We use the term 'plutocrat' for good reason, as such are persons who exercise political power based upon their wealth.

The wealthy person, or more commonly, the wealthy corporation, can buy political power by hiring lawyers wise in the ways of government operations to go to the halls and offices of power and solicit actions on their behalf. The levers over elected officials are most clearly financial. However, the levers over bureaucrats are more subtle, involving use of incentives and punishments spread over years and throughout various departments and agencies.

For example, when a firm grows large and abuts the restrictions of the Sherman and Clayton Antitrust Acts, it may use its economic power to manipulate the agencies which administer and enforce those acts. In order to see exactly how this is done, we must descend into the practical, daily minutiae of political and bureaucratic life in the capitol. First, the plutocrat business must make large and sustained financial contributions throughout the political system, so as to appear neutral as to any particular cause, person, or agency. Then, it may establish latent rewards and punishments throughout the edifice of government, corresponding to its various objectives. When such objectives are manipulation of the antitrust enforcement agencies, it focuses its real efforts on the Justice Department and the Fair Trade Commission, being sure to protect its appearance of neutrality by maintaining equally vigorous involvement with other irrelevant government agencies and entities.

The plutocrat may then institute a variety of policies aimed at obtaining its antitrust objectives, such as regularly hiring friendly retirees of the antitrust division of the Justice Department at profligate salaries, or by eliminating recalcitrant antitrust enforcers by securing them lucrative private-sector positions. Much attention can be paid to the bureaucrat holding the Antitrust Division position of Director of Operations, since this officer handles antitrust assignments and can refer the plutocrat's matter to a pliable and sympathetic subordinate, insuring that the agency will conform to the plutocrat's wishes. He may also punish unsympathetic staff by sidelining them with tedious work, drudgery assignments, or manipulation of office perks like parking space changes and work area reconfiguration. The subordinate bureaucrat can find himself either lionized or ostracized, his career elevated or ruined. Over time, such practices allow the plutocrat to secure approvals and leniency in close cases and indefinite matters; the plutocrat may even find cooperation in more egregious matters. When such policies do not result in the desired outcome, the plutocrat may add more pressure by appealing to the President, who being sufficiently influenced by contributions, can have an assistant or general counsel direct the plutocrat's matter to a specific Antitrust Division attorney for handling, or have a recalcitrant attorney hired away by some other loyal supporter. Once the plutocrat has obtained influence over the official directly responsible for considering his matter, he may further pursue his goals by supplying a draft for the bureaucrat's use in writing an agency approval or opinion letter regarding the plutocrat's matter.

If yet more pressure is needed, the plutocrat may cross over to the Legislative branch and apply pressure to it, for it has its own ways to manipulate agency behav-

ior. It controls the agency budget, and it can be specific and subtle enough in its appropriations to alter the comfort of the recalcitrant agency or members of its staff. It also has the ability, through its subpoena power and hearing procedures, to put a public spotlight on agency or agency personnel misconduct. If pressure is applied with skill, the plutocrat can encourage the legislature gently to twist the spigot of budgetary appropriations or shine its spotlight in desirable directions. In extreme circumstances, the plutocrat can instigate legislation itself to achieve his purpose.

Respondent says this is fantasy and insists that no person could ever be wealthy enough to buy every politician in America, as the gun allegory suggests. They add derisively that the tale of the short-lived Roman Emperor Julianus is a complete absurdity with respect to the United States, for no person could ever be wealthy enough to buy the American federal government. But simple arithmetic proves otherwise. At the close of the twentieth century in America, Gates had a personal fortune of nearly one hundred billion dollars. With this sum, if he wished, *he could pay for the campaigns of every incumbent and their challengers in every State and Federal political office in the nation for several decades*. He could then recoup his costs, and much more, through his resulting control of the entire United States political apparatus.

If we assume that each of the 100 federal senators and their adversaries spend an average of five million dollars per campaign, paying for all of these campaigns would cost one billion dollars. This is the cost of buying the entire Senate of the United States. It would not matter who won, for any elected official would owe his political position to the sole financier of his campaign. Next, assuming that each of the 435 Congressmen and their competitors spend three million dollars per campaign, the cost of paying all their campaign expenses would be 2.6 billion dollars. Thus, the House of Representatives can be bought for this price. We might estimate that the Presidential campaigns of the two largest party candidates cost around seventy million dollars each, thus the Presidency can be had for the bargain price of 140 million dollars. All three branches could be bought for $3\frac{3}{4}$ billion dollars per election. Since the terms of each are different but all divisible by 12 years, a twelve-year monopoly of political power could be bought for just over 18 billion dollars: six House terms at 15.6 billion, two Senate terms at 2 billion, and three Presidencies at 420 million. Gates could do this *five times in a row*; that is, he could personally fund every elected federal officer in America and their challenger for sixty years running.⁴¹⁷ If he bought the State officers as well, he would perhaps have only have thirty years of virtual control. Still, the overweening power of the American federal government during Gates' lifetime makes buying State officers unnecessary to complete domination of the United States. Respondent challenges the accuracy of our estimated campaign expenditures. We believe these estimates are accurate, but if they are exaggerated, it makes no difference; the ability of an individual to buy the entire government for even one hour is disastrous to justice and liberty. The current Gross Domestic Product of the United States is 9,756.7 billion dollars.⁴¹⁸ This means the government can be purchased by anyone with a net worth of around 1% of the gross domestic product.

Many articles of legislation have been passed to deal with the worst of such plutocratic manipulations of government power. These include campaign finance laws,

⁴¹⁷ Longer if we allow for interest on his unused funds during the sixty years.

⁴¹⁸ United States Bureau of Economic Advisors, *Current-Dollar and "Real" Gross Domestic Product*, 1st quarter, 2000.

antitrust and fair trade laws, ballot access laws, polling and election statutes, laws allowing free access to government documents, and perhaps most dramatically, taxes on income, capital gains, property, estates and inheritances. When seen in relation to the problem of political power generated by wealth, these laws naturally fall into two principal categories, preventative and curative. Antitrust and fair trade laws are preventative, while all the rest are curative. This is to say that only antitrust and fair trade laws aim to prevent the creation of excessive wealth-based political power; all the other laws aim to prevent merely the exercise of such power. Doctors are wont to say that prevention is the best cure. And, as a disease is usually best remedied by eliminating its potential growth as opposed to preventing its effects once it is flourishing, we must inquire into the antitrust and fair trade legislation before discussing the curative laws. A complete prevention of politically potent wealth is obviously the ultimate cure to the problem of plutocratic political influence. However, the costs of this ultimate cure are great, indeed worse than the disease, and therefore, resort must be had not only to preventative laws, but also to the curative type for the elimination of the noxious political effects of super-wealth.

The Sherman act was passed with the obvious objectives of limiting the untoward power of vast business enterprises. However, much conjecture remains as to exactly which ill effects were primarily on the minds of the 51st Congress when they passed the act. Initially, most courts believed that the primary focus of the act was to protect the interests of small businesses and maintain thereby a competitive marketplace. This objective was seen as consonant with the legislative intent to preserve fairness and equality among the peoples and businesses of the nation. Later, however, the act came to be interpreted a safeguard not for small business but rather the interests of the consumer. Bork, a leading proponent of this interpretation, contended that "the legislative history of the Sherman Act, the oldest and most basic of the antitrust statutes, displays the clear and *exclusive* policy intention of promoting consumer welfare."⁴¹⁹ The consumer's best interests were understood to flow from an optimally efficient marketplace, whether this entailed oligopoly, selected monopolies, or multitudes of small enterprises. There was no longer a special value placed upon the existence of small firms. Instead, efficiency was said to be the act's only objective, even if this entailed the destruction of small firms by larger, more efficient enterprises, since such would maximize consumer interests.

This perspective naturally assumes that Democracy does not suffer by any shift in the marketplace away from small firms to domination by larger ones. It assumes that efficiency has no adverse political effects, or if it does, that these are sufficiently addressed elsewhere by other factors or laws, such as tax policy and election law. This assumption is implicit in all strict-efficiency antitrust analyses, and it is an explicit feature of many efficiency school theories, like that of Posner, who introduces his theory of antitrust analysis with the preface, "assuming that antitrust policy is to be shaped by economic analysis of the monopoly problem...."⁴²⁰ This is an admission that the social or political effects of antitrust legislation are not to be a part of the antitrust theory he advances.

It is true that Posner addresses one sociopolitical objection to monopoly, namely the potential for large firms to manipulate the political process in order to obtain pro-

⁴¹⁹ Bork, *The Antitrust Paradox*, Part I, Chapter II. (Emphasis supplied.)

⁴²⁰ Posner, *Antitrust Law, An Economic Perspective*, Part I, Chapter II.

tective, profit enhancing legislation.⁴²¹ However, he fails to notice that the political manipulation may be unrelated to the firm's objectives. It may occur in an entirely different area of government, for reasons unrelated to the profitability of the firm. This may happen because, as we have seen, firms are not truly profit maximizers. They are very often management-ego maximizers, and the corporate chairman or CEO is likely to ignore the interests of the stockholders and pursue personal aggrandizement to the limits of his or her ability to do so safely. It is this very conflict of interest between management and stockholders that made the Securities and Exchange Acts necessary, for without these firms did not profit maximize. Instead, management maximized its own personal income and perquisites at the expense of the firm, the stockholders and debt holders.

Bork's opinion that the Sherman and Clayton Antitrust acts protected solely the financial activities of consumers is simply wrong. They indeed sought to protect political interests as well. To the extent that legislative history is any guide for the interpretation of statutes, the framers of the Sherman Act indeed voiced political concerns regarding the problem of vast business combinations. Senator Sherman himself stated in the Congressional record that:

The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of...the vast combinations...If we will not endure a king as a political power we should not endure a king over the production.⁴²²

These explicit references to social order, equality of wealth, preservation of opportunity, and the maintenance of Democracy in trade as well as government, reflect a concern with the political aspects of business concentrations, not merely a concern for the ability of consumers to enjoy the fruits of an efficient market. Senator Sherman, in fact, summarized his bill by calling it a "bill of rights" and a "charter of liberty." No honest construction of these terms could limit them to so narrow a compass as mere consumer welfare. As many have noted, consumer welfare can in many cases be maximized by violating liberty, by promoting inequality of wealth, by destruction of opportunity, and by the diminution of Democracy. Posner offers proof of this in his discussion of efficient monopolies.⁴²³ The Sherman Antitrust Act was intended to oppose consumer welfare in those cases where the political and social welfare of the citizens is retarded by an efficient monopoly. Thus, those who claim the legislative history of the Sherman Act "displays the clear and *exclusive* policy intention of promoting consumer welfare" are simply ignoring the above portions of the Congressional record that disprove them.

We must ask whether construing antitrust legislation so as to maximize consumer welfare is detrimental or complimentary to maximizing the citizens' political welfare. Every citizen is a consumer, as is every corporation. On the other hand, no corporation is a voter. No business entity as such has any right to a voice of political consent.

⁴²¹ Posner, *Antitrust Law, An Economic Perspective*, Part I, Chapter II.

⁴²² 21 Cong. Rec. 3: 2456-62. (Cited and Quoted at length in Thorelli, *The Federal Antitrust Policy, Origination of an American Tradition*, Chapter IV, Section I.

⁴²³ Posner, *Antitrust Law, An Economic Perspective*, Part I, Chapter II.

In a nation grounded in the legitimizing theory of the consent of the governed, the business entities as such are indeed governed without their consent. Now, this is not the place to determine whether corporate persons should be included in the franchise, for such would be a question which falls more comfortably under the topic of the proper objects and purpose of government and the nature of political legitimacy. According formal political power to corporate persons would create, in essence, a new constitution, one in which the 'people' included these entities. Many problems would arise, not the least of which would be inequality of the franchise and political classes of citizens. It is not our purpose to canvass the impropriety of such a structure for the popular element at this juncture.

Suffice it to say that business entities have no vote under the American constitution, and therein they differ from the citizens in this crucial respect. Under the Constitution of the United States, they are supposed to exercise no political power. That they do so is the problem with which we are now wrestling, for the goal of anti-trust policy must be either to eliminate, reduce, or at least, not promote their ability to exercise political power, if they are to support the American constitution's political structure.

The American constitution enshrines capitalism, as we have seen, and one 'externality' of such a market system is inequality of wealth, which creates differentials in political power. This creates a question of aristocratization of society. When we consider the public good, it must be asked whether such progressive coalescence of Aristocracy is indeed in the public interest. As for economics, such a phenomenon is clearly productive of greater production, efficiency, and wealth in general, and hence a higher *per-capita* standard of living for the citizens. Thus, the purely economic advantages of business Aristocracy are undeniable. These advantages only seem to disappear when such aristocratic effects approach the extreme of monopoly. And, we must concede, that they continue even in the case of some monopolies, when efficient. Of course, we have already traversed this ground and concluded that an economic separation of powers is called for, one which contains a balance of small proprietors, medium-sized firms, and efficient monopolies.

Now, there are also military advantages to the democratic element which accrue from the efficiency of the economy. A richer nation with a more powerful economy can better defend its rights and customs. If these are democratic, then Democracy is better protected. But we must analyze in a more formal fashion whether a strong industry is always productive of greater liberty. If it is, then there is no incompatibility between an antitrust policy aimed at enhancing liberty and one aimed at promoting industrial health. If this thesis is taken as correct, then the debate regarding the proper objective of antitrust policy is moot. The goal could be either Democracy or efficiency, for they would mutually produce one another.

To the extent that Democracy and efficiency are contradictory, however, the debate remains. If this thesis is pushed to its extreme, even efficiency is inefficient in the long run: The efficient economy which destroys the democratic element will have thereby destroyed itself, for it will have unbalanced the political vessel upon which it depends. It will sink into revolution and the conditions for successful economics will have perished. States which allow their popular constitutional element to be destroyed render themselves relatively less stable and thereby their longevity is decreased. They become harmonically unbalanced. This cannot serve the interests of industry or the people in the long run, for revolution destroys both in due course.

For these reasons, we conclude that efficiency cannot be the only goal of Anti-

trust Policy because efficiency creates political power. Political power can augment or retard Democracy, and when this occurs, a properly mixed constitution is unbalanced and eventually collapses. Only such efficiency as promotes political stability can be allowed in an economic system, and this is the true goal of antitrust policy. Any goal based on pure economic efficiency in the short term is bound to be inefficient in the long term due to its adverse effects on the democratic element. Therefore, when one claims that efficiency is the ultimate goal of Democracy, they must admit that they are constrained to define efficiency as long term efficiency, and this is political efficiency, not strictly economic efficiency. Thus, the goal of antitrust legislation is political at its core, even when defined in terms of efficiency. Political efficiency, in turn, requires a healthy democratic element, and thus, the truest goal of antitrust law is to preserve that democratic element and the overall harmonic arrangement.

In light of the foregoing, we find that the Petitioner's power to consent has been attenuated but certainly not fatally compromised by Respondent's antitrust policies. Moreover, since the benefits which accrue to the state, and in turn to the Petitioner as citizen thereof, overbalance this diminution of consent, we dismiss her 'lack of consent upon antitrust grounds' defense as yet without serious merit. Respondent seems to have taken acceptable care of its democratic element in this respect.

THAT CONCENTRATIONS AMONG MILITARY INDUSTRIES ENDANGER JUSTICE AND REQUIRE ADDITIONAL SEPARATIONS UNNECESSARY TO OTHER BUSINESSES.

Petitioner now amends her complaint regarding business oligopolies to address only the military industrial complex. Petitioner claims that the Respondent's concentration of military research, development, and manufacturing among a few firms creates a threat to liberty and gives a few behemoths too much bargaining power vis-à-vis the civilian political and even military authorities. Respondent answers that military industries are exceptional and require a higher degree of consolidation and cooperation than other industries, in order to perform their role in producing integrated, reliable, and superlative military armaments. We agree that the military industries are unique and must operate according to special rules. However, these rules require, as Petitioner suggests, less concentration in these industries than permissible in others.

Without armaments, no constitution can defend itself, however many people are willing to give their lives in the effort. And without superlative weaponry, not only might the effort still be in vain, but many lives would be needlessly wasted even in a successful effort. Such weapons cannot be created by the public sector, which is by nature un-competitive and un-creative. Responsibility thus places military production in the hands of private companies. This is the best arrangement for national defense. Unfortunately, it introduces an element of risk. Together, these companies have the material ability to wage war almost as effectively as the government they serve, and by withholding their products, they can not only deprive the nation of its capacity to defend itself, but offer a significant offensive threat. Were the entire military industry placed in the hands of one firm, its president would have potentially more power at his disposal than the president of the Republic. Only manpower would be lacking, and not all weapons require operators. He could sell his weapons or secrets to an enemy state in exchange for wealth and position, sabotage or gerrymander production in order to influence the outcome of military contests. He could recruit his own army. The

list of potential abuse is endless. For this reason, military manufacturing must be fragmented into many thousands of firms, directed by adversely motivated individuals. Not only will such competition result in quality, innovation, and efficiency gains with regard to the armaments themselves, but will prevent a single firm or small group of firms from usurping executive power and overthrowing the constitution. Thus, no firm or clique will be able to extort, coerce, or threaten the activities of the legitimately constituted powers of government. Consolidation in Respondent's military industrial sector is growing intolerable and must be addressed. However, it has not reached the point of being offensive to justice. We therefore issue only a warning to Respondent on this count.

THAT LABOR UNIONS ARE A SPECIES OF POLITICAL PARTY

A labor union is a cooperation among like-minded people to procure a particular outcome on an issue of distributive justice. The difference between it and traditional political parties is that the labor union's efforts are primarily directed towards private business enterprises. Under the harmonic constitution, this is an effort by some part of the popular element against some part of the aristocratic. The aristocratic element is consonant with the government, and thus union efforts are attempts for the people to counteract and influence the policy of the government of a business enterprise. After all, management is but another name for government.

The union is itself an aristocratization of the labor force, or the people, in the same manner as is the common political party. Its governing rules and structures determine the degree of aristocratization within the union, and its share of the relevant constituency determines its power relative to the business enterprise government. If the union encompasses all of the people within the constituency, it is a monopoly and creates the damage of any other political monopoly; it will dominate the enterprise, fall into corruption, and the structure will collapse from external competition or internal revolution. The preservation of harmonic balance in the economic setting of healthy capitalism requires that unions be permitted, and that they be regulated largely as are orthodox political parties, with respect to their relevant constituencies and the managements they target.

THAT THE 12-BAR BLUES FORMULA IS THE SONIC EXPRESSION OF THE HARMONIC CONSTITUTION; HENCE BLUES IS THE MUSIC OF JUSTICE

Petitioner next alleges that the Respondent has attempted to prevent the popular element from learning about justice by maligning and censoring the popular music known as 'the blues'. Respondent refused to answer this challenge on the grounds that it was too absurd to warrant a reply. We shall therefore tender a reply on their behalf and rule on this novel claim.

The blues is a formula for musical compositions. It was born out of the loins of the United States. It has a dark legacy in slavery, imprisonment, labor camps and destitution. The formula for the blues is simple. Twelve sections or 'bars' of four even beats apiece. Although variations exist, quintessential blues is slow blues. Assuming

the traditional eight-note scale, a 12-bar blues is played as follows: the first bar is the one chord, or based on the first note of the scale. The second, on the four chord, the third and fourth bars again on the one chord. The fifth and sixth bars are on the four chord, the seventh and eighth back on the one chord. The ninth bar is on the five chord, the tenth on the four chord, and the eleventh back on the one chord, finished by the twelfth bar on the five chord. Thus, in the key of A the blues formula is: AAAA-DDDD-AA-AAA-DDDD-DDDD-AA-AAA-AA-AAA-EEEE-DDDD-AA-AAA-EEEE. This phrase repeats throughout a blues song and is the formula around which innumerable blues compositions have been arranged.

The lyrics of the 12-bar blues pattern are quite political, usually taking the form of classical syllogistic argument: the first four bars state premise one, the second four state premise two, the third four state the conclusion, or in the alternative, the first eight state the conclusion, and the final four reveal the premise. A third style is to have a premise and conclusion in each of the four bars. In this way, the 12-bar phrase can be made to announce one, two, or three conclusions in mutual support, narrative relation, or independent of one another. This makes the 12-bar format the most explicit and intense form of argumentation possible. Examples of such blues lyrics are ubiquitous, but we will cite some from the works of Son House:

Yes, I'm gonna get me religion. I'm going to join the Baptist church
 Yes, I'm gonna get me religion. I say I'm going to join the Baptist church
 You know I want to be a Baptist preacher, so I won't have to work⁴²⁴

This is a logical argument in the following format: if A then B, if B then C, if C then D. Therefore, if A then potentially D. If he joins the church, he will be religious. If he is religious, he can become a preacher. If he becomes a preacher, he will not have to work. Therefore, if he gets religion, he may not need to work. Another Son House lyric of this fashion is as follows:

Its so hard to love someone who don't love you
 I said its so hard to love someone who don't love you
 Ain't no satisfaction, don't matter what you do.

The underlying logic is clear: unrequited love is hard because there is no satisfaction. There are two propositions, one a premise, the other a conclusion. Such is the logic inherent in the lyrical structure of the 12-bar blues formula.

As to petitioner's claim, there are two points which must be established before it makes any sense, namely that the blues formula is a sonic analogue of justice, and that Respondent has maligned or censored it. If these two claims are true, then we will rule on whether that conduct is unjust.

We are aware that the twelve-bar blues formula is analogous to the harmonic constitution, which has six sections, half popular, one third executive, and two thirds aristocratic. The twelve bar arrangement is identical in that half of it is the one chord,

⁴²⁴ Son House, *Original Delta Blues*, Track XI "Preachin' Blues." Columbia Legacy Reissue; Sony, AISN B000007T4P.

one third of it the five chord, and two thirds the four chord. Moreover the basis of the blues is the one chord and the peak or top is the five, corresponding to the basis of political power in the people and the executive element at the head of the government. But without more, these can be explained away as mathematical coincidences. There must be additional proof that the blues is the sonic expression of justice. Its perfect use of the harmonic ratio, identical to the harmonic constitution, is alone not enough for us.

Certainly the blues is a music of justice insofar as it deals with issues of justice and injustice, with life and death and happiness and suffering. But so do many musical styles. Nevertheless, blues is different in that it was born from grating injustice and suffering, as an antidote to that suffering. Blues was invented by the black slave, black freedmen, black prisoners, and black tenant farmers, in an era when they suffered the most extreme injustice. We need not add that this was at the hands of the Respondent. These were people intimately familiar with justice because they had none of it. The blues was born out of injustice, to cope with injustice, by discussing justice. Its form and content are intrinsically political. Son House sang about the Southern penitentiaries and the notorious black codes that swept blacks into prison wholesale:

Down South, when you do anything, that's wrong
 Down South, when you do anything, that's wrong
 Down South, when you do anything, that's wrong
 They'll sure put you down on the county farm

Put you down under a man they call "Captain Jack"
 Put you under a man called "Captain Jack"
 Put you under a man they call "Captain Jack"
 He'll sure write his name up and down your back

Moreover, the tempo or 'beat' of the blues is political. The blues evolved in the fields and prisons, where tenant farmers, prisoners, and chain gangs labored their lives away. The tempo of the labor was the key to life: work too slow and be whipped or starved, to die of injury and disease; work too fast, and die of fatigue and exhaustion. Only one tempo would work, the tempo of life. The blues set the tempo of each task, such that life was possible. The axe-work evolved slow blues phrases around a single beat, the words not falling on the beat, since the body was at that time busy delivering the axe-blow. Such rhythms are as follows: "Oh Ro-sie"...Thud..."Oh-a-girl--"...Thud..."Oh Rowsie"...Thud..."Ooh Babe"...Thud. Spade-work was faster, and lighter, the stokes falling a bit less than every two seconds. The lyrics could fall on the spade's down stroke, signified in bold type below, with a 'click, rest', pattern, where the clicks and bold-face lyrics coincide with the spade strikes, as in "**click**, rest, **click**, rest, **click**, ain't but the **one** thing **click** I done **wrong** rest **click** stayed in Mississippi just a **click** day too **long** rest **click** ain't but the **one** thing **click** I done **wrong** rest **click** stayed in Missi-sippi just a **click** day too **long** rest. The syncopation was often turned around merely by singing one phrase on the blow of the spade, and the next during the rest.

This politico-rhythmic essence of the blues can be confirmed by the recordings of

Lomax and Jackson, who brought tape recorders to the fields and prisons where the actual songs were still sung. In their words:

The subject has do with making it in Hell...The songs are sung outdoors...it is darkness or absence or lost-ness or vacancy or deprivation that they are about...The constants...are the most obvious, the guards, escape, sentence length, [things] longed for, sickness, death...The songs concentrate on the devices and forms of control and the manifestations of impotence...things like un-love, un-freedom, and unimportance...In the Southern [United States] prison system, work songs served to pace the men who hoed and chopped, to mediate between the strong and the weak, to pacify the prison bosses, to amuse, console, and dignify the man who worked everyday from sunup to sundown under the eyes of armed guards...We saw that the songs, quite literally, kept the men alive and normal.

From the 1870's until the 1920's, many of the Southern states leased convicts, most of them black, to private companies. These convicts performed such heavy labor as timbering, turpentine extraction, mining, railroad work, and industrial farming, with no concern given to their safety, health, shelter, or clothing. Starved, half-clothed prisoners were forced to work from 'can't see in the morning to can't see at night.' Local sheriffs replenished this cheap labor pools as needed, often framing innocent citizens or following the infamous Black Codes, making arrests for "loitering," "idling," trespassing, not surrendering the sidewalk to a white person—any one of the trumped up charges that applied only to Black Americans. For such minor crimes, judges meted out harsh sentences to black defendants who were healthy and strong and likely candidates for the work farm. These sentences were rarely served in their entirety: the men were simply worked to death...In 1904, [the Mississippi penal facility known as] Parchman farm was built...its fifteen camps covered 46 square miles. Cotton was planted on several thousand acres...In design it resembled an antebellum plantation with convicts in place of slaves. Both systems used captive labor to grow the same crops in identical ways...Assisting the prison employees were 'trusty shooters,' prisoners serving long sentences, usually for murder, who were willing and able to intimidate other prisoners. They were entrusted with guns, and if they shot a man trying to escape, they were usually pardoned by the governor. Often this meant that a murderer was given his freedom in exchange for killing a burglar [or an innocent arrested for being black.] ...These were the conditions which produced the songs Alan Lomax recorded in 1947 and '48...In 1972, a class action suit in Federal Court commenced [Parchman Farm's] demolition...These songs are mounted upon the passion that this struggle with nature brought forth. Even more importantly, they tell us much of the story of the slave gang, the share-cropper system, the lawless work camp, the chain gang, and the pen.⁴²⁵

⁴²⁵ Lomax, *Prison Songs: Historical Recordings From Parchman Farm, 1947-48*. Rounder CD 1714.

These were the conditions which produced the blues across the American south. There is no doubt in our minds that the blues is a quintessentially political art-form dealing primarily with issues of justice. For this reason, Petitioner's claim seems to warrant our attention. We will therefore consider whether Respondent stifled or censored this music, and if so, then the potential injustice of such conduct. This will require an extensive investigation into the Respondent's history of black slavery.

Respondent now declares, however, that it will fully admit to having unjustly stifled this form of music, so long as Petitioner concedes that now the blues are no longer disparaged, and begs that the court not inquire further into the relationship between The United States and the blues. Petitioner has agreed. We therefore will honor the Respondent's desperate plea not to discuss the blues any further, mindful of the doors left thereby unopened.

THAT THE CREATION OF ARTICLE ONE COURTS IS UNCONSTITUTIONAL AS WELL AS UNJUST

We now address the Respondent's motion to transfer this case to the United States Federal Tax Court for resolution, claiming that such would be more appropriate than trial by us. Respondent argues that a treason execution will result in immediate estate and death taxes, not to mention potential escheats, which will increase Federal revenue and place the case within the Tax Court's jurisdiction. They argue that the case should therefore be transferred to their Tax Court for adjudication *de novo*, or afresh. We reject this motion, as it would place the Petitioner in the clutches of a biased court dominated by her adversary. We hold that the Tax Court, like every so-called Article One Court, is biased. It is not independent from, but rather part of, the legislative branch and thereby violates the separation of powers and amounts to trial by legislature. Under the circumstances, it also would allow one of the parties to sit in judgment of the entire case.

Although Respondent has paid lip service to maintaining the separation of powers in principle, stating, "time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches..."⁴²⁶ Respondent's court has not held that the branches should "operate with absolute independence."⁴²⁷ We have observed already the degree to which the court is willing to violate this principle, particularly in the agency context. The creation of Article I courts presents yet another example of the Respondent's debauchment of the separation of powers in practice. An Article I court is managed and run as part of the legislative branch. An example of an Article I court is the United States Tax Court. It is part of the legislative branch, not part of the judiciary, despite the constitution's clear requirement that the legislature have no judicial power. Kent summarized the orthodox view that the under the constitution, the adjudicative power of the federal government was *exclusively* vested in the Judicial branch of Article III.⁴²⁸ This places Article I courts in an illegitimate light, from which they cannot escape but by some showing that their misplacement is either consonant with or sup-

⁴²⁶ *Morrison v. Olson*, 487 U.S. 654.

⁴²⁷ *United States v. Nixon*, 418 U.S. at 707.

⁴²⁸ Kent, *Commentaries*, Part II, Lecture XIV.

portive of the separation of powers which it so strikingly seems to violate. Can their constitutionally suspect presence in the legislative branch be justified by their salutary operation upon the separation of powers? Kent proclaims that judicial power must effectively balance the power of the legislative branch, a goal which depends wholly upon its *independence* and its *adequate size and capacity* compared to the mass and velocity of legislative activity.

The judicial power in every government must be *coextensive* with the power of legislation. Were there no power to interpret, pronounce, and execute the law, the government would either perish through its own imbecility, as was the case with the Articles of Confederation, *or other powers must be assumed by the legislative body to the destruction of liberty*. In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics it is equally salutary, in protecting the Constitution and laws from the encroachments and the tyranny of faction...It is requisite that the courts of justice should be able, at all times...to deal impartially and truly, according to law, between suitors of every description...To give them the courage and the firmness to do it, the judges ought to be confident of the security of their salaries and station. Nor is an independent judiciary less useful as a check upon the legislative power, which is sometimes disposed, from the force of party, or the temptations of interest, to make a sacrifice of constitutional rights...⁴²⁹

Kent thus describes legislative usurpations of adjudicative functions as symptoms of a defective constitution, an imbalance among the powers, 'destructive of liberty'. What Kent describes is precisely what has happened in the case of Article I courts. They are part of the legislative branch and by definition present an imbalance between the lawmaking force of the legislature and the adjudicative power of the offsetting judicial branch, being an accretion to the one and a diminution of the other. This assumes that the ratios of legislative to judicial capacity were balanced prior to the creation of Article I courts, and that these courts were not designed to rectify a disequilibrium therein-between.

Accretions of legislative power at the judiciary's expense almost always create dis-equilibrium, particularly in the American constitution, which contains a threateningly powerful legislative element. This point was made by Madison in *The Federalist*, when he wisely noted that, "In republics, the legislative power necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches...[T]he weight of the legislative power requires that it be thus divided..." And Hamilton stated even more emphatically that, "...the judiciary is beyond comparison the weakest of the three departments of power." He then cites Montesquieu's comments to the same effect: "Of the three powers above mentioned [the executive, legislative, and judicial], the judiciary is next to nothing." It is worthy to note that the organization of the constitution reflects this hierarchy of intrinsic strength, for Article I, the legislative branch, is the strongest element and accordingly

⁴²⁹ Kent, *Commentaries*, Part II, Lecture XIV.

listed first, Article II, the executive, is listed second, as the next strongest, and Article III, the judiciary, is listed third, being the weakest.

Not only is the judiciary the weakest of the branches, it is also the most imperiled, as it most directly intrudes into the daily lives of the people, for the courts actually apply the laws to the them, and unlike the remote legislator, it is the judge that the people come in contact with, and they often fix upon him the blame which is more rightly due the legislature, as Kent noted.⁴³⁰ With both the peril and weakness of the judiciary in mind, it is clear that an investment of judiciary functions in the legislative branch would create an extreme imbalance among the constitutional powers. The Article I courts have done just this; they give judicial power to the legislature. In doing so, they present a *prima facie* violation of the principles of separated and balanced powers upon which liberty and ultimately justice depend, and firmly support Petitioner's claim that the American system of government is unjust. Article I courts are for these reasons intrinsically and irrevocably biased. We would no sooner send Petitioner to face such a court than send her to suffer any other trial by legislature. It would be an injustice, and we therefore refuse Respondent's motion to transfer this case to such a court.

THAT EXECUTIVE CONTROL OVER THE ATTORNEY GENERAL IS DANGEROUS TO THE STRUCTURE OF LIBERTY INHERENT IN THE CONSTITUTION.

Petitioner alleged early in this case that Respondent had upset the separation of powers by placing the entire government's legal representation under the authority of the executive branch, thereby placing the others at an acute disadvantage during inter-governmental disputes. We have not forgotten the allegation, and we now turn our attention to it. It seems extravagant that the federal constitution would permit the President to control the Attorney General when this officer is to represent parties and interests adverse to the President. When government lawyers under executive control represent the judiciary or legislature against the executive, an unacceptable conflict of interest arises. The executive is enabled to bring suit against itself, which it will not do with the competence and determination that would characterize an unbiased prosecution. The office of Attorney General, around which is structured the so-called Justice Department, is mired in this fundamental conflict of interest. This is not only theoretically obtuse, but practically dangerous to the structure of liberty inherent in the Constitution.

Presidential appointment of the Attorney General offends justice as it diminishes the other branches' lawsuit power and gives it to the executive, who will exercise it to their ultimate detriment. This power places the executive in a position to distribute federal law-enforcement arbitrarily and therefore poses a constant threat to the liberty of the nation.

This danger became a reality during Nixon's Presidency. A scandal engulfed Nixon when his agents burglarized the opposition party's political offices in an effort to assist his re-election campaign. Two federal powers exist to check such conduct. First, Congress has the power to impeach the President, the effect of which is to de-

⁴³⁰ Kent, *Commentaries*, Vol. I, Part II, Lecture XIV.

prive him of the Presidency and return him to the status of a private citizen. Second, the Attorney General can investigate and prosecute the matter as a crime. In order to appear at first pious, but finally to forestall and possibly obviate a Legislative impeachment proceeding, Nixon instructed his Attorney General to investigate the matter by appointing a so-called independent prosecutor, but he then used his power over the Attorney General first to rig, and later to hamstring, the prosecutor's investigation. This was not difficult, as this department was entirely under Nixon's control. He was, in essence, investigating himself.

The special prosecutor impaneled a grand jury to investigate Nixon and determine whether sufficient evidence of wrongdoing existed to justify a criminal trial. Congress discovered, however, that Nixon tampered with the grand jury investigation by having his private counsel arrange with the Attorney General for the Executive office depositions to be taken outside the grand jury's presence. Nixon also procured, via the Attorney General's control over the Federal Bureau of Investigation, a list of the FBI's likely questions, which enabled Nixon's agents to coach the witnesses. Nixon was also able to order the FBI to destroy certain damaging evidence against him. When this became public, the Attorney General resigned. A replacement Attorney General refused to give evidence to the special prosecutor, again on Nixon's orders. The special prosecutor then got a subpoena from a Federal court ordering the delivery of the evidence. Nixon appealed and lost, whereupon, he ordered the new Attorney General to fire the special prosecutor. The Attorney General refused and resigned, whereupon yet another replacement was appointed, the infamous Bork, who was pliant enough to obey Nixon and fire the special prosecutor, ending the investigation. Infuriated, Congress pressed for and got another special prosecutor appointed by the Nixon administration. Congress still did not put into motion its impeachment machinery, though this option lay at hand. The new special prosecutor asked the supreme court to enforce the subpoena. The court ruled that the matter was an intra-branch executive dispute and that Nixon had delegated the matter to his own underlings and could only regain control over them by the revoking and re-delegating in like manner. This was constitutionally accurate but politically suicidal, as impeachment proceedings were now beginning in earnest. Thus, Executive control over the Attorney General's office, including the FBI and the Special Prosecutor, resulted in the predictable outcome that the Executive refused to investigate itself honestly.

J. Edgar Hoover also engaged in such abuse, when, as an agent of the executive branch, he used his position as Chief of the Federal Bureau of Investigation to obtain information enabling him to usurp legislative and judicial power almost indefinitely and with relative impunity. In Hoover's case, the investigative and prosecutorial power of the Justice Department was used for massive blackmail, invidious prosecution, and systematic defamation.⁴³¹ Hoover secured himself against dismissal by compromising his bosses within the executive branch, usually by providing them with irresistible but illegal intelligence regarding their political enemies. Once compromised, neither the President nor the Attorney General could fire him but by risking their own careers. Thereafter, Hoover was free to use the machinery of the FBI to extort and intimidate the other branches and advance his own personal agenda.

It was rumored that he had investigated every celebrity and public official in America, and tens of thousands who seemed likely to become such. After gathering

⁴³¹ Gentry, *J. Edgar Hoover*, Chapter XXVI.

enough information, he could manipulate individuals and the other branches by threat, insinuation, or actual release of disparaging information. Whether his files were actually this extensive was irrelevant; the possibility alone was sufficient to intimidate even the most innocent politician or bureaucrat. If this pressure did not work, he would unleash upon them a humiliating and debilitating public investigation of their most intimate private affairs. We heard that once, when a freshman Congressman suggested trimming the FBI budget, an experienced committee chairman replied, "My boy, I would no sooner cut the FBI budget than jump out that window!" Hoover's control over Presidents and their Attorneys General meant that the government's entire prosecutorial power could never be used against him. In the event, the entire nation simply had to wait for him to die. Thus, Hoover's case shows another variant of abuse which predictably results from exclusive executive control over the Attorney General's office and its prosecutorial power. It can be usurped by an underling in the executive branch.

Certainly, giving the executive exclusive standing to bring accusations on the state's behalf places the President in the potential position of judging his own case, at least insofar as he judges which actions are to be brought against himself. Interestingly, Montesquieu mentions just this possibility when arguing that the executive ought not be a judge in any dispute.⁴³² It has been held again and again that none should be a judge in his own case, and that this principle of justice arises from nature, needing no confirmation but a consultation with the timeless and universal ideals of justice. Coke articulated this immutable principle in *Dr. Bonham's Case*, wherein he denied Parliament's ability to legislate contrary to common right and reason, specifically in creating a judicial officer able to judge his own case.⁴³³ Additionally, Montesquieu's condemnation of self-judgment supplies reasons so logical and compelling that no room is left for disagreement.⁴³⁴ The most profound reason against self-judgment is that it reduces the polity to one of men and not laws, as the formalities and principles of judging give way to the caprice of the judging party's opinions of themselves.

Moreover, self-judgment by the executive in the American constitution conflicts with the executive right to pardon, as it renders the President, paradoxically, empowered both to condemn and then absolve the same defendant upon the same facts. The pardoning power is thus rendered duplicative by the power to refrain from prosecution. For all of these reasons, we conclude that the President's control over the Attorney General is dangerous to the structure of liberty inherent in the constitution and general principles of justice.

⁴³² Montesquieu, *The Spirit of the Laws*, Book VI, Part I, Chapter V.

⁴³³ *Dr. Bonham's Case*, 8 Coke's Reports, 114 (1610) (Announcing a doctrine of judicial review for England which was never adopted.)

⁴³⁴ Montesquieu, *The Spirit of the Laws*, Book VI, Part I, Chapter V.

THAT THE OFFICE OF ATTORNEY GENERAL MUST BE MULTIPLIED INTO FOUR IDENTICAL OFFICES, ONE FOR EACH BRANCH OF GOVERNMENT AND ONE FOR THE PEOPLE AT LARGE.

Respondent asks where, if not in the executive, we would have them place the state's prosecutorial power and the office of Attorney General. We agree that prosecutorial power is partly an executive function and we concede that Respondent has therefore placed it in the executive branch. But not all prosecutorial power is executive. The area delineated by the term, 'prosecutorial discretion' is purely judicial, since here an officer judges whether or not to apply the law. Moreover, the Attorney General exercises hues of legislative power. The truth is that the Attorney General's role is partly executive, partly legislative and partly judicial. Therefore, placing it in a system of separated powers creates a unique problem. About the proper placement of this power, much can be learned from the example of Rome.

The Roman Republic addressed this problem by establishing a popular prosecutorial power, the office of the 'Tribunes of the People,' which could bring suit against the executive, senate, and most magistrates for the general or specific grievances of the people and remain immune from legal retaliation. This office was created as a means of reconciling the economic interests of the masses with the aristocracy in Rome.⁴³⁵ By 495 BC, the nobles, Senate, and Consuls of Rome had become nearly all creditors, and the Roman masses, nearly all debtors. Debt relief was refused and the people faced foreclosures and imminent slavery. The judges and officers of government to whom complaints could be directed were themselves creditors, and thus the masses had no hope of debt relief but revolution and secession, both of which occurred. The whole populace abandoned the city of Rome, and leaving it a ghost town, encamped on a nearby hill. At this height of desperation, Rome was instantly invaded by her foreign enemies, who knew that without her people, and hence her arms, Rome was utterly defenseless. The aristocrats were forced to settle the crisis in order to enlist an army for Rome's defense. So, according to Livy:

A compromise was effected on these terms: the plebeians were to have magistrates of their own, who should be inviolable, and in them should lie the right to aid the people against the consuls, nor should any senator be permitted to take this magistracy. And so they chose two "tribunes of the people" ...⁴³⁶

Thus in Rome, the people themselves had a share of the prosecutorial power and exercised it through the office of the Tribunes. The Tribunes were ten persons from among the plebeians, elected annually to represent the interests of the people against the entire Roman government. Although their vast powers varied through the years,

⁴³⁵ Yet another proof that Constitutions are intrinsically economic in nature.

⁴³⁶ The number of tribunes was five from 471, and ten from 457. Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book II, Chapters XXIII—XXXIII, especially Chapter XXXIII Sections I-VIII.

some things remained constant, particularly their ability to veto the resolutions of the senate, make arrests, to propose fines in the plebeian assembly, to inflict fines prescribed by statute, and to intercede in the action of any magistrate, particularly when such was judicial. Hence they exercised an appeal power. Although their power was often excessive, particularly the absolute veto power, their prosecutorial power and ability to intercede in trials and initiate appeals, gave the people a crucial power as opposed to the government of Rome. The Tribunes brought strength and organization to the democratic element of Rome.

Respondent has not considered the establishment of such a tribunician office, but rather put the prosecutorial power of the entire government into the grasping hands of the executive and constrained the people to undertake private lawsuits, heard at the pleasure of the government, for the redress of a narrow range of specific grievances. We believe this scheme to be inimical to public liberty and the separation of powers. When adversaries of the executive branch are forced to use executive prosecutorial power against the executive, they have no real hope of justice since they are compelled to use agents of their adversary to attack their adversary. And, when the people have no share of prosecutorial power vis-à-vis the government, they sit at an identical disadvantage. These prosecutorial conflicts of interest, first between the executive and the other branches, and second, between the government and the people, are too great for justice reliably to result.

In answer to Respondent's question, the office of Attorney General and its prosecutorial powers must be multiplied into four such offices, each fully exercising the same powers, one distributed to each branch of government, and one reserved to the people at large. The reason for this becomes clear upon historical analysis. The American office of attorney general arose under the constitutional format of Monarchy. In Great Britain, the King evolved the attorney general's office in order to have an agent through whom he could conduct the legal business of the monarchy. He was a King, and there was no other constitutional element which made his control over the attorney general an awkward arrangement, especially before the Magna Charta. He created a government's lawyer, and he was the government. To the extent he was a monarch, he had authority over everything. A King's investigating or prosecuting himself was an impossibility under monarchy. Its very possibility is eliminated by the maxim 'the king can do no wrong,' a doctrine still known as sovereign immunity.

When the British monarchic rule over the North America collapsed and was replaced by mixed governments featuring separated powers, however, the attorney general's office was accidentally not divided likewise. It had handled the whole government's legal business when the government was in one man, but it was not divided into three when the government was so divided. It was placed in the executive branch from habit and expected to do its work on behalf of all three branches, an idea inimical to the genius of the separated powers, which is founded on the predictable competition between the branches, not the benevolent disinterestedness of part of the executive branch. The attorney general represented the whole government when it was monolithic, and should have been split when the government was divided into parts with equal weight. Thus, each branch should have its own office of Attorney General. Moreover, since the ideal constitution is harmonic, each harmonic element should have an attorney general's office. Since the monarchic and aristocratic elements have theirs in the government's three offices, the people are left as the only

harmonic element without such an office. Thus, four attorney general's offices must be created, one for each branch of the government and one for the people, this last office being, analogous to Rome's Tribunes of the People. The manner of filling this office should be by plurality vote of the branch or the people, making the executive's Attorney General essentially appointive, those of the legislature and judiciary elective by branch plurality, and the popular office, or 'Tribunate,' elective by plurality of the whole populace. We do not hold that an American tribunate should embrace all the powers of the Roman model. Such would be an abominable extreme. We are referring merely to the prosecutorial powers of the Roman tribunate.

A Tribunate would help the people safeguard their interests vis-à-vis the government by improving both their standing and legal resources. It would also allow them more easily to obtain review of their issues on certiorari to the supreme court. It would give them an institutionalized, repeat player who, having appeared many times before the supreme court, will be in a position to get that court's attention for certiorari review far more easily than could any private citizen. The supreme court is not obligated to hear all appeals from state supreme courts and federal appellate courts, but rather it may choose among those who petition for review, this petition being called a petition for certiorari. It thus sets its own docket according to its own priorities. But in fact, the federal attorney general's office, through an officer called the solicitor general, has a tremendous influence on the court's choices regarding certiorari. The petitions filed by the solicitor general are far more likely to be granted certiorari than any private petition. This is because the solicitor general is a repeat player who knows the court's predispositions and idiosyncrasies, and moreover, can develop a bond of trust with the court over the years as a party whose petitions are normally deserving of certiorari.

A trio of branch attorney general offices also resolves the conflict of interest currently plaguing Respondent's constitution when a judicial impropriety is adjudicated by the judiciary. The judiciary should obviously not hear a case regarding its own wrongdoing. The judicial forum for inter-branch disputes should always be in the uninvolved branch's office of attorney general, acting as a neutral court. When two branches are in dispute with the third, then the forum should be the People's Tribunate. And the Tribunate may choose its forum from among the attorney general offices of the uninterested branches. If it is in dispute with all the branches, then it must divide the action and pursue it piecemeal in such a manner as to afford a neutral venue for each part, or if mandatory joinder makes such impossible, then by a congress of state legislatures. Intra-branch disputes should be settled by the branch itself. And finally, each attorney general should have the power to veto a president's use of his pardoning power.

The fractal ideal of the federal harmonic constitution implies that such quadruple Tribunates should be adopted not only by the federal government, but also by the member states and their micro-federal subdivisions. We must not forget that the family is the smallest part of the federal fractal.⁴³⁷ At the family level, this ideal is already

⁴³⁷ Ignoring for the moment Plato's constitutional characterization of the individual sole in the *Republic*, which otherwise extends the federal fractal to the level of the individual. Under this theory, the individual is the central federal power and the several departments of his or her soul are its members.

realized by each person's standing to sue other family members and conduct related discovery. For minors who lack standing on their own, the institution of a guardian ad-litem must be made to provide them a tribune-like power. In this way, the quadruple Tribune will permeate the harmonic constitution at each of its federal layers.

The Attorney General of the Tribune should be removable by majority recall in order to align his activities as perfectly as possible with the democratic element's interests. This is true whether there is only one such officer or whether the office features co-equal colleagues. This is the procedure invented by the Gracchi in Rome, a technique which eliminated the Aristocrat's ability to co-opt the Tribunician college. The Roman Tribunes could halt any legislation by the veto of even one Tribune. The aristocrats soon discovered that they could stymie all popular legislation, that is, all anti-aristocratic legislation, by buying off one Tribune, who would exercise his veto on behalf of the Aristocrats. Gracchus proposed to the public assembly that such a Tribune should be recalled by popular vote and replaced with one who would more closely serve the people's interests. After all, that is what the Tribune was designed to do. The popular assembly followed Gracchus and passed the law. It may or may not have been a perfectly legal manner of legislating. It was, however, a righteous law. As can be expected, the people were for it, the aristocrats against it. But the aristocrats simply could not suffer such a blow to their power. Unlike earlier crises in Rome, the Aristocrats this time resorted to violence. Gracchus was seized and killed, a riot broke out and was brutally repressed; the Republican constitution began then to crumble into a miserable oligarchy, lasting until Octavian established the Roman Empire as Caesar Augustus. This story illustrates not the danger of Tribunician recall, but rather the propriety of it. It is a device of real and decisive power in the hands of the people; hence the Roman aristocrats could not suffer it.

The officers filling the positions of Tribune must, however, be elected on a proportional basis based on party percentage, in order to have sufficient advocates for minority causes. This confirms that the Tribune must be a collegial body, not dominated by or structured around a single individual. It would not, therefore, have one Attorney General, but many. And as an aside, the people's Tribune should house the office of public defender, as these officials ought not to be a part of the judiciary lest it be a party to the cases it hears.

Returning to the United States, perhaps the attorney general's function was not divided along with the rest of the government because the office was not considered part of the constitutional structure, but rather something to be created through the necessary and proper clause. This construction would be a mistake, however, as the office is an integral governmental feature and should derive its power and limitations from the constitution. The awkwardness of a single attorney general may have also remained unnoticed due to the fact that it is not such an obtuse arrangement in a parliamentary system, as they have hardly any separation of powers in the first place.

Therefore, we hold that the present configuration of the attorney general's office supports Petitioner's claim of injustice. Incidentally, that office's failure to represent its entire Nation in this proceeding further convinces us that this is a just holding. Respondent pleads that we recognize the fact that associational standing has already spread a kind of tribunician power far and wide in America. We agree with this. It is a step in the right direction.

**THAT SECRET OPERATIONS STRENGTHEN THE ELEMENT
OF THE HARMONIC CONSTITUTION EMPOWERED TO
CONDUCT THEM; THAT EXECUTIVE BRANCH SECRET
OPERATIONS HAVE DEBAUCHED THE AMERICAN
SEPARATION OF POWERS**

Respondent next excuses its vilification of Polyneices and order of Petitioner's execution since both parties were part of a conspiracy by outsiders and disloyal citizens to destabilize and subvert the government of the United States. Respondent insists that such subversive acts injure every American citizen and constitute a supreme and unacceptable injustice. Thus, Respondent insists that their conduct, while perhaps unsightly, was a just reaction to a grave and unjust threat to their own peace and stability caused by the subversive acts of treasonous, disloyal citizens and subversive outsiders.

Petitioner immediately motioned this court to throw out Respondent's defense on the grounds that they cannot argue points in which they disbelieve. According to Petitioner, the United States should be judicially estopped from arguing that foreign and domestic subversion are wrongful, since their conduct proves that they do not actually hold such a belief. Respondent insists, on the contrary, that they strongly believe subversion to be unjust, and they offer as proof the United States' efforts against subversive Imperial Communism throughout the Twentieth Century. Respondent defines subversion as 'an attempt by outsiders or disloyal citizens to disrupt and defeat the domestic political process.' Respondent reminds that the Communist Manifesto explicitly called for the destruction of capitalism, democracy, and the United States government, that communism indeed tried to do this, and that America strenuously and successfully exerted itself against such subversion globally for a period of over eighty years.

Before accepting Respondent's offer of proof and defense, we wish to scrutinize the Respondent's actions against subversives, particularly communists, including the covert and secret operations of the Federal Bureau of Investigation, the State Department, and the Central Intelligence Agency. Respondent strongly demands that we do not disclose any of its secret operations on the grounds that such disclosure would gravely injure the stability and viability of its government and endanger the lives of spies in the field. We reply that Respondent cannot offer a secret defense. Since they introduced these matters into evidence in an attempt to prove their own innocence, we will not now permit concealment.

In weighing Respondent's attitude towards subversion, we will briefly review some major incidents of subversion involving the United States, some secret, some not. In 1914, the United States intervened in Mexico's civil war in order to insure that the capitalists won; in 1915, Haiti; in 1916, The Dominican Republic and Mexico again, the second of eleven interventions; in 1917, Cuba; and in 1918, Panama and the Russian civil war. The latter was an explicit attempt to destroy communism. The former, attempts to fortify capitalism. Nevertheless, they were all attempts to subvert, disrupt, or defeat the political processes of other nations. Respondent now offers to withdraw its defense and urges us to move to other claims in this case. We agree to do so and will move on to other matters.

Petitioner now amends her complaint against the United States to include the following: 'That the United States is unjust in its secret, subversive governmental operations.' We grant this amendment and hence continue our analysis.

In 1953, the United States secretly assisted the Shah of Iran to subvert the Mus-sadegh government and install himself as tyrant. In 1954, a secret American operation toppled the elected government of Guatemala. In 1957, a secret American operation gerrymandered the Lebanese election on behalf of the Christians. In 1961, America covertly helped assassinate the communist party leader Lumumba in Zaire and installed the tyrant Mobutu. Later in 1961, the United States secretly invaded Cuba. After this failed, America attempted to assassinate the Cuban tyrant Castro between eight and twenty-four times. The United States unsuccessfully gerrymandered the 1970 elections in Chile and aided a 1973 military coup that resulted in the death of the election winner. Moreover, during the 1960's, the FBI secretly attempted to destroy the American civil rights movement and promote race-based social inequality. We have yet to confirm our suspicions, however, regarding CIA and FBI involvement in the assassinations of Malcolm X and Martin Luther King, Jr.

These incidents entirely destroy the Respondent's assertion that it thinks subversion unjust; Respondent does it all the time. Obviously, the Respondent believes that subversion is perfectly just under certain circumstances, namely when furthering its own interests. But we are no longer asking whether subversion or counter-subversion is just, but rather whether secret subversion and counter-subversion are just, for this is the Petitioner's amended claim. She holds that the secret, subversive activities of the United States are unjust.

We would state as a preliminary matter that the subversion of the less just in favor of the more just is relatively just. However, secret subversion is a different matter. The secrecy itself presents a grave injustice. Government actions cannot be entirely secret if the separation of powers is to operate. The above-mentioned subversive acts were conducted by the executive branch. As they were secret, the offsetting checks and balances of the judicial and legislative branches could not operate with respect to these. Moreover, the democratic element was kept entirely ignorant and thus defeated. The executive branch was thus able to dominate the federal government and marginalize the checks and balances of the constitution in any matter which it could keep secret. The executive branch, through the agency of the FBI and CIA, thus largely escaped and debauched the American separation of powers. This exemplifies the fact that secret operations destabilize the harmonic constitution in favor of the element empowered to conduct them.

However, there is an exception to this principle: the secret operations of the democratic element do not destabilize the constitution. They do the reverse, for as we have seen, the democratic element can have no strength at all unless it has the ability to engage in free thought and unfettered political association. These activities require privacy, which is secrecy from government when desired. Moreover, there is no need for reciprocal openness between the government and the popular element. The principal has no duty to disclose to the agent, whereas the agent has a duty to disclose all matters within the scope of agency to the principal. The people are the principal and government is the agent. Thus, government disclosure is mandated by the principal-agent nature of political structures, but not popular disclosure. Popular secrecy is a key component of the strength and efficacy of the democratic element and hence of the stability of the harmonic constitution.

Now, there is a narrow range of secret operations, particularly espionage, that must exist if the harmonic constitution is to survive. Its necessity derives from the inability to eliminate it. Espionage is a direct result of the competitive attributes of human nature. As long as there are human beings there will be competition through associations and there will be spies incident thereto. Political structures must therefore be designed to render espionage compatible with justice as created through the harmonic constitution. First, the fact of espionage must not be secret. Second, the scope and nature of espionage must be public and hence subject to the forces of the harmonic constitution. Third, espionage must be limited to the collecting of information, not the conduct of any proactive measure or other executive, judicial, or legislative operation. Fourth, the types of information must be limited to those which do not affect the harmonic elements' balance, especially the democratic. And fifth, the specifics of espionage must be eventually made public in politically useful intervals. This publication will both retard the efficacy of espionage and enhance the accountability of the elements empowered to conduct it. Thus, a balance must be struck between the need for effective espionage and the need for oversight on behalf of each element of the harmonic constitution. In some cases, the element empowered to spy will itself be in need of oversight of its sub-parts. Indeed, there have been many cases of a President's ignorance regarding the secret operations of the executive branch. Moreover, we recognize that publications of counter-espionage activities should naturally be less frequent than regular espionage reporting, and that code-breaking need never be reported, save in case of code relied upon by the democratic element.

Since some nations will spy, all must spy. And since some element of the harmonic constitution must therefore spy, all elements must spy, and such espionage must be made public in a manner sufficiently timely to reduce the chance of a decisive abuse of such secret actions by any element. This publication will be a result of the very fact that each element conducts its own espionage, excepting that the popular element must not be a target of such espionage save for its spy agency. If there is to be one spy agency, there must be one for each branch of government and one for the people, as was the case with the greater office of attorney general. This follows naturally from the fact that secret operations strengthen the element of the harmonic constitution empowered to conduct them; to maintain equality, then, this power must be evenly distributed. The only modification of this principle is that the popular element be empowered to conduct secret activities with impunity regarding free thought and political association.

The propriety of mutual espionage among rival elements is reflected in the rules of civil procedure, which provide discovery devices and mandate disclosure of various facts between the parties to a lawsuit. The plaintiff is given no monopoly on information. Neither is the defendant permitted such a monopoly. Nor is the prosecutor, which as we have shown, is a position which must be multiplied into four offices, one for each branch and one for the people. The attorney general's investigative function is essentially espionage in this sense. As the office of attorney general and what the Respondent calls the Justice Department are to be multiplied into four, it is only natural that the intelligence-gathering subdivision of that department be also multiplied into four. This follows from what we have already deduced. Intelligence is power. The wise always win in the end. They also find more justice. This is why education and free thought are necessary to the democratic element. Only through them

can it exercise meaningful power against the remaining constitutional elements. For the same reason it must be empowered to spy.

Respondent pleads that we reduce the severity of our censure regarding their secret governmental activities, as they have already taken steps to aid each branch and the general public to discover the activities of the government. This is the so-called ‘Sunshine in Government Act’, which allows a supervisory member from each branch to observe the non-public meetings of any other branch. Also, the Freedom of Information Act allows the people to obtain various government documents as a matter of right. Both acts take steps towards the kind of information sharing that we recommend in our analysis of espionage. We agree and will so meliorate our censure of Respondent in this regard.

THAT AMERICA’S UNINCORPORATED TERRITORIES VIOLATE ALL PRINCIPLES OF JUST GOVERNMENT

Respondent next argues that Petitioner may be treated as they see fit, since she has elected to emigrate to Puerto Rico, a territory which the United States congress governs as it pleases. Petitioner denies that she emigrated at all, saying that she simply vacationed there but was detained by American federal agents who refused to let her return. Respondent points out, in its own defense, that she is no longer there, but rather in the United States pursuing this legal action. Petitioner explains that when it became clear to her that America meant to jail her at all costs, her attorneys secured her return to America, so as to be detained in a normal United States Federal Penitentiary rather than languish in a Puerto Rican jail administered by the United States Congress.

Even had Respondent succeeded in forcing émigré status onto Petitioner, they would still be prevented by this court from trying and punishing her as they wish. We find the political status of Puerto Rico, a territory under American control but not subject to the full United States Constitution, an abomination to justice so severe that only a complete rejection of Respondent’s argument will satisfy us.

Once upon a time four million people, subjected to the unlimited authority of Colonial masters across the waters, rose up and proclaimed independence upon principles of justice and natural right. Now these very people, having become nearly three-hundred million, are themselves colonial rulers of four million Puerto Ricans, governing them without their consent. We find this fact to be a perverse repudiation of nearly every syllable of the Constitution and the Declaration of Independence, and moreover, a blasphemy to the entire thrust of American jurisprudence.

Respondent urges us to recognize that its supreme court has authorized the Puerto Rican status as constitutional,⁴³⁸ and that the Puerto Ricans are mainly content with

⁴³⁸ See generally the “Insular Cases”, to wit, *Downes v. Bidwell*, 182 U.S. 244 (1901); *Rassmussen v. United States*, 197 U.S. 576 (1905); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

that status.⁴³⁹ We note that Puerto Rico has also filed an amicus brief regarding this claim, stating that they have taken many referenda and their own people are not eager to radically change their status. We acknowledge that most Puerto Ricans may be content with basic aspects of their status. But in our opinion this arrangement is not an acceptable format of government.

Respondent reminds that it permitted Puerto Rico to write a constitution for itself in 1952, which created a 'commonwealth' with attributes of self-sovereignty. Puerto Rico has an elected governor, an island Senate and House of Representatives, and a judiciary. We recognize the fact, but these institutions nevertheless exist at the pleasure of the United States Congress, over which Puerto Ricans have no control. Moreover, Congress delegated them the powers to make this constitution as a matter of charity, and could revoke it any time by simple majority vote. We ignore, for the moment, that congress never had any clear constitutional power to acquire and govern territory on its own.

Puerto Rico's so-called constitution exists at the whim of The United States Congress, a body over which Puerto Rico has absolutely no control. They are therefore still a colony of the United States, whatever they or the United States feel about it. Under present conditions, their status violates the federal harmonic ideal and is hence unjust. No checks and balances obtain between Puerto Rico and the United States. It is merely an American imperial possession. Puerto Rican status also violates the fractal ideal of political structures. Under the Northwest Ordinance, new territories were wisely incorporated into the United States along fractal lines. All new territories and peoples were arranged into nearly identical member-states of the federation, on an equal footing with the previous states. This was indeed the source and engine of American power, and it afforded the basis of American justice. For the United States to abandon its fractal, as Rome and Athens finally did, is a heavily disappointing development, one which puts a sunset upon American justice, strength, and growth.

This injustice afflicts all the rest of America's unincorporated territories as well: American Samoa, Baker Island, Howland Island, Guam, Jarvis Island, Kingman Reef, Midway Islands, Navassa Island, The Northern Mariana Islands, Palau, Palmyra Atoll, The U.S. Virgin Islands (St. Croix, St. John and St. Thomas), and Wake Island. They must be invited to form States, on an equal footing with all other American states, or freed and abandoned. There can be no middle ground, there must be no lands relegated to the status of Congressional step-children.

Respondent protests that the peoples of these territories have been granted American citizenship, except for those of American Samoa, who are called U.S. Nationals. Therefore, Respondent insists, they enjoy all the justice annexed to that term. We reply that there can be no citizenship classes in America, nor should there be, and calling these people, who cannot vote in American presidential elections, who have

⁴³⁹ A 1967 non-binding plebiscite among Puerto Ricans found 60% in favor of a cryptic 'commonwealth status with opportunity for development,' 38.39% for American statehood, and .039% for independence. A 1993 plebiscite 48.6% for enhanced commonwealth status, 46.3% for statehood, 4.4% for independence. A third plebiscite in 1998 found .06% for un-enhanced commonwealth status, 50.3% for the strange "none of the above", and 46.6% for statehood. See Burnett, *Foreign In A Domestic Sense*, Preface.

no vote in the American Congress, calling them citizens is a lie. They are not citizens if citizens at all, strictly speaking, for they have no institutional legislative influence on the federal government or its member states. As relates to the American Federal government, all three of their per-capita elements are suppressed; neither the democratic, aristocratic, nor monarchic elements exert any real influence. As for this status, and that of American national, we refuse to consider it anything more than the status of American subject.

By our count, the United States has more than thirteen colonies of its own. Their presence is a shameful and despicable rejection of just government, surpassing even the lamentable quasi-sovereign situation of the American Indian Tribes. Considering the founding history of America, to have four million colonial subjects in fourteen colonies is an unimaginable hypocrisy and a wholesale rejection of justice. Therefore we reject Respondent's assertion that it can treat Petitioner as it wishes since she lives in Puerto Rico. The possibility itself proves Petitioner's claim, that the United States system is not perfectly just.

Petitioner adds that American possession and management of foreign territory is in itself unconstitutional. We agree that neither Congress nor the other branches ever had any enumerated power to acquire and govern foreign territory. In the words of Jefferson:

The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the union. An amendment to the constitution seems necessary for this.⁴⁴⁰

We hold, however, that coming into the possession foreign territory is not a power of government at all, but a result of some political circumstance, the result of some use of governmental power. It is a circumstance, and the constitution does not speak to the question of whether such circumstance is impermissible. It is possible to come into possession of new territory indeed without any desire or effort to do so at all, such as when Capua gave itself, its city, and its territory to Rome in order to stave off annexation by the Samnites. The Roman senate was shocked by the event.⁴⁴¹ The power to dispose of newly possessed lands is therefore, a circumstantial necessity which cannot be written out of any constitution. It is rather a predicament, not a power, of government. The only question remains as to how such possessions should be governed, and there is only one good answer: acquisitions must be governed in the same manner as prior territories, and these should ideally by arranged into a harmonic federal constitution. This preserves the fractal nature of political growth and stability.

America's application of the Northwest Ordinance to the lands acquired from France under the Louisianan purchase is a perfect example of what we are talking about. New territories were added to the federal republic as new states, equal in all federal respects to the older states.

⁴⁴⁰ Jefferson, *The Political Writings Of Thomas Jefferson*. (Peterson, Ed.) Letter to John Breckenridge, August 12, 1803.

⁴⁴¹ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book VII, Chapter XXX.

THAT THE CONFEDERACY NAMES THE RESULTING GROUP OF STATES, NOT THE GROUP GOVERNMENT

Next, we consider Petitioner's motion to vacate judgment on the ground that Respondent misstated its name in this and all of the previous proceedings, concealing their real identity from the court. We find this claim to be both novel and supported by the evidence, but still of little worth. We do not believe it entitles the Petitioner to the relief she requests. Instead, we penalize Petitioner for wasting the court's time with this claim. Our grounds for this decision are as follows.

A federation's appellation names the resulting group of states, as a club names its membership but not its leadership, and the name of the leadership is predicated of the club name, for example, the Government of Australia. The name Australia, without more, is the name of the country, not its government. We refer to the leadership as the 'Confederacy's Government,' but not as the Confederacy itself. Common usage erodes this clarity, especially when the possessive noun is replaced with the adjective, as in the 'Confederate Government,' or the 'Federal Government.' This causes tremendous confusion, as we shall see. Hence, we shall adhere to the principle that a confederation's name names the members of the group, and not its central government or authority.

THAT THIS DISTINCTION IS GARBLED IN THE CASE OF THE UNITED STATES

Respondent has listed its name as the United States of America. What *is* the term "United States of America?" Is this the name of the federal government or rather is it the name of the group of states? We hold that it cannot be both, for if it is the one, it is surely not the other. Everyone would agree that New York is part of the United States. Logically, therefore, its laws should be part of the United States as well. But how, then, can the laws of the United States preempt the laws of New York, as the constitution mandates? The laws of New York *both are and are not* laws of the United States, depending on the meaning of United States. The root of this paradox is the equivocal use of the name, meaning either the group of states or the federal government. Ironically, these are both very common and very contradictory usages of the country's name, for under America's constitutional structure, the states are explicitly independent and separate from the federal government. The federal government acts upon the people, not upon the states, which remain independent sovereignties. Thus the federal government is not, in fact, the united states of America. It is not the group of states themselves, but rather a separate thing their citizens created. Thus, the federal government ought not to be called the United States of America, for such is the appellation merely of a group of sovereign states, not the name of their central authority.

THAT THE AMERICAN FEDERAL GOVERNMENT HAS NO NAME; AND THAT WHEN IT IS CALLED THE UNITED STATES, THIS IS MERELY SLANG

Nevertheless, the federal government is often called the United States, as Respondent has done here. In fact, the constitution fumblingly uses the name United States of America in both senses. The document purports to establish a “constitution for the United States of America,” meaning for *the group* of states. But in the tenth amendment, the powers “not delegated to the United States...are reserved to the states,” i.e. the individual states. This clearly means that the “group of states” is not the United States, indicating that the term United States here means precisely and only the federal government. We believe that the federal government has no name; it has been given none as of yet; and that when it is called the United States, this is merely slang, for although it forms the union between them, it is not the group itself, but something distinct from this group of sovereign states. Only if the federal government is *not* the United States of America can one logically say that New York is a part of the United States.

Moreover, those who claim that the United States is merely a geographic expression are wrong as well, for the place, the location, of the group is not the group itself; the group of states would be no less a group wherever is location. Thus, the United States is not this place, or that land. One must not think the label “United States” upon the map is the name of the geographic zone delimited by the drawn lines. It is the name of the group of states which control the territory so delineated. The school-teacher who points to a map and says, “This is the U.S.,” is speaking merely slang.

THAT THE AMERICAN FEDERAL GOVERNMENT OF THE UNITED STATES ALWAYS MISSTATES ITS NAME WHEN IT PROSECUTES OR DEFENDS A LAWSUIT

We now can consider the practical use of the name “United States,” which includes the naming of the Federal government when party to a lawsuit. For instance, *who really is* party to the case of *United States v. Dred Scott*? Is the federal government prosecuting the case? Or is it the group of states? Which has standing? And how would the prosecution amend their complaint to clarify this? In the matter of standing, the identity of the accuser is of critical importance, and it ought to admit of no doubt, obscurity, or question. If the accusatory instrument fails to name the accuser with specificity, how can the defendant exercise his right to confront his accusers? Indeed, *who are* his accusers? Hence, to avoid such embarrassing questions, we must adhere to the principle that a confederation’s name names the members of the group, and not its central government or authority. Here, the Respondent made this mistake and has proceeded throughout under a slang name. Since this was an inadvertent misstatement which did not, under the circumstances, prejudice the Petitioner, we will ignore the claim. We caution, however, that this misstatement, under other circumstances, could have generated sufficient confusion and obfuscation to justify a complete termination

of the proceedings in Petitioner's behalf. Since the claim under the present circumstances is frivolous, we accordingly penalize Petitioner as follows: She must send to Congress a draft-bill proposing an official name for the Federal government, to be paid for by the federal government, regardless of what she chooses to call it.

THAT DENYING COMMERCIAL REGULATORY POWER TO THE EXECUTIVE TENDS TO AVOID THE MERCANTILISM WHICH AFFLICTED FRANCE AND ENGLAND.

Returning to our holdings of injustice in the administrative agency context, Respondent argues that our adverse findings regarding administrative agencies should be mitigated by the fact that regulatory power has at least been denied to the executive. We agree and will so mitigate. The power to regulate commerce is given to the federal legislature by Article I, section VIII, which states that Congress shall have the power to "...regulate commerce with foreign nations and among the several states, and with the Indian tribes." This placement of regulatory power at once denies it to the states, the executive and the judicial branches; and while most discussions focus on the preclusive effect this has upon state commercial regulations, the denial to the federal executive merits even greater attention. It is by denying the executive this power that the constitution avoids the mercantilism which hamstrung the English economy during the seventeenth and eighteenth centuries. The danger of investing the executive with regulatory power is exemplified by the reign of Charles I, for when that monarch was desperate for cash, he organized a system of monopolies, grants, licenses, and ranks, which coagulated into a swamp of indirect revenue-generating regulations. In thus regulating commerce, he found relief from the penury that could be, and was, forced upon him alternately by the economies and extravagances of parliament.⁴⁴² This anecdote reminds us not only that executive control over commercial regulation entails a risk of economic malfunction, but also, and perhaps more importantly, that the commerce power ought not be divorced from the revenue power, lest the rival branches become at once irresponsible and injurious to one another, as we shall now investigate. We therefore applaud Respondent's withholding of regulatory power from the executive. We admonish, however, that executive control over mixed-power agencies almost completely negates the benefits of such a scheme.

THAT REGULATION AND TAXATION ARE ACTUALLY SIMILAR POWERS, AND MAY BE MUTUALLY NULLIFYING IF PLACED IN DIFFERENT GOVERNMENTAL HANDS

There is another reason why we approve of Respondent's denial of regulatory power to the executive, namely that regulation and taxation are actually similar powers and may be mutually nullifying if placed in different governmental hands. Marshall clarified that the power to tax comprehends the power to destroy the object

⁴⁴² Churchill, *A History of the English Speaking People*, Volume II, Book V, Chapter XIV.

of taxation,⁴⁴³ and Kent explained that the power to regulate commerce likewise includes the power to destroy its object.⁴⁴⁴ Are these powers, then, mutually antagonistic, as one may destroy the object of the other and the holder of either can therefore exercise or enjoin both? It could fairly be argued that these are, in fact, aspects of the same power, or more properly, that each power overlaps the other. Note that the tax power is part of the greater power to regulate commerce, as the tax power is but one method of influencing and controlling commerce, and that the opposite conclusion is possible as well, since regulation is a means of indirect taxation. If they are overlapping powers, then the distribution of each to a separate body establishes a concurrent power, not a separation. Therein lies the danger of divorcing these powers. It is dangerous insofar as it may frustrate the efforts of those who, wishing to separate powers, accidentally multiply them. The powers of taxation and regulation are both legislative and should not be vested in the executive. But more interestingly, the establishment of concurrent powers must be avoided, as it tends towards a mutual negation of power unless one is rendered subordinate to the other. This subordination may be wanting if the powers are unknowingly concurrent and distributed among strictly rival elements. In the federal context, concurrent powers may be safely exercised by states and the national government precisely because such subordination is required of the states. Such is not the case horizontally among branches of the federal government. For these reasons, the tax and commercial regulatory powers must be united in one branch.

Certainly, the concurrent aspects of tax and regulatory powers argue against delegating regulatory power to agencies. To classify and subdivide the legislative power among multiple competing entities may present the danger of creating mutually negating concurrent powers to some extent. We must not overlook the fact that the derogatory effects of competing legislative bodies can actually be of great utility in limiting the inherently overweening power of the legislative branch, which needs diminution by subdivision in order to be balanced by offsetting government branches. In the United States, this is done by bifurcating the legislative branch into two competing entities, a Senate and a House of Representatives. As long as such subdivisions remain within the legislative branch, subject to the elective consent of the people, and their legislation forced into a penultimate consolidation prior to presentment and final enactment, they do not offend the separation of powers at all, but actually enhance it.

THAT BROAD INTERPRETATION OF THE COMMERCE POWER DESTROYS CONSTITUTIONAL EQUILIBRIUM

Petitioner next alleges that the United States is unjust in its broad exercise of power under the Constitution's Commerce Clause. Petitioner cites the sheer scope of federal power arising under the so-called commerce clause as evidence of the unjust nature of the United States. We must therefore look more deeply into the commerce clause power and see whether it advances or retards justice and the federal harmonic constitution. We believe that the modern interpretation of the commerce power has introduced a reign of excessively centralized authority and federal legislative domi-

⁴⁴³ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819).

⁴⁴⁴ See Kent, *Commentaries*, Volume I, Part II, Lecture XIX, regarding the case of *The United States v. The Brigantine William*.

nance noxious both to federalism and harmonic constitutional equilibrium. We therefore hold that Respondent is unjust in this respect.

The history of Respondent's commerce power begins with the formation of their constitution. The power to regulate commerce was given to the federal government in Article I, Section VIII, and the laws thereunder enacted bind the several states under the supremacy clause of Article VI, which states that the "constitution, and the laws of the United States made in pursuance thereof...shall be the supreme law of the land,...any thing in the constitution or the laws of any state to the contrary notwithstanding."⁴⁴⁵ Thus, the federal government's legislative power pursuant to the commerce clause binds every state and is limited only insofar as the commerce clause power itself is limited. We shall see, however, that the limits to this power have been obliterated, and only recently has some idea of a finite commerce power returned. The benefits of federal harmonic constitution have been diminished as a result, proportionally weakening American liberty.

THAT THE COMMERCE CLAUSE WAS CREATED TO STIMULATE NATIONAL ECONOMIC HEALTH, WHEREAS IT HAS BECOME AN INFINITE POWER, OFTEN USED TO DEBAUCH AND INJURE COMMERCE

A quick review of commerce clause history establishes beyond refutation that it has escaped its original purpose and become a nearly infinite power, oversetting the balance among the federal branches and between the federal and state governments, and denuding the constitution of its safeguards for liberty. The original purpose of vesting a preemptive commercial regulatory power in the federal government came from the dislocations of commerce among the colonies during the 1790's, dysfunctions which steadily rose to the level of economic fratricide. The commerce power formed the centerpiece of a governmental scheme expressly designed to amplify and extend the private economic and industrial power of the nation as a whole by eliminating the toxins of protectionism. Montesquieu described this supportive relationship between governmental regulatory power and trade succinctly, explaining that the absence of regulation is not the hallmark of a free government, but rather free government contains those commercial regulations which, while hampering the trader, do so to the general advancement and augmentation of commerce.⁴⁴⁶ This supports the original conception of the federal commerce power as a tool for the enhancement of commerce. We must emphasize that it was not for dampening trade, redistributing wealth, or promoting public health, although these are the purposes to which the power is now perverted by Respondent. Because it has become hijacked to purposes antithetical to any the founders envisioned, the commerce power now stands nearly in opposition to many of the explicit economic provisions of the constitution.

Respondent insists that its commerce power has limits. We will not accept this: their own words prove it to be limitless. The clause authorizes regulation of interstate but not 'intra-state' commerce. Respondent, however, has used it to regulate nearly

⁴⁴⁵ *The Constitution of the United States*, Article VI, Clause II.

⁴⁴⁶ Montesquieu, *The Spirit of the Laws*, Part IV, Book XX, Chapter XII.

everything. In *Wickard v. Filburn*, Respondent's supreme court punished a lowly Iowa farmer for producing a 'trivial' amount of wheat on his own property for his own consumption, stating that this was an act of interstate commerce. Respondent had no difficulty using the commerce clause power to regulate this microscopic conduct under the ridiculous premise that it was interstate commerce. The supreme court stated that farmer Filburn's trivial reduction in the demand for interstate wheat may be regulated by the Federal government since when "taken together with that of many others similarly situated, [it] is far from trivial."⁴⁴⁷ Upon such logic, sleeping, eating, even *living*, all affect interstate commerce. According to the *Filburn* opinion, there is no limit to the commerce power. It renders every other enumerated power in Article I, Section 8 mere surplusage. It becomes unnecessary to mention any other power of Congress when the commerce power envelopes them all, reaching everything they reach and everything else besides. Thus, we find for the Petitioner, that Respondent has created an unjust system of government by exercising an unlimited power.

Respondent counters that it no longer recognizes the commerce power as having such broad sweep as stated in *Filburn*. We agree that this is technically correct, for the moment. However, the degree of change has been trifling, and in no way meliorates the tremendous injury done to American federalism and the separation of powers.

THAT CONSTITUTIONS WHICH MAXIMIZE ECONOMICS MAXIMIZE LIBERTY, AND THOSE WHICH BEST AFFORD LIBERTY MAXIMIZE THE ECONOMY

When we analyze the federal constitution's commerce power, we must constantly remember that the augmentation of public liberty is inseparable from that of private commerce, and the disparagement of the one is always disparagement of the other. Illiberal governments produce no great wealth over the long term, as great wealth requires capitalism, and hence a healthy democratic element, from which liberty results. Such is the theoretical underpinning which unites economy and liberty. They are both merely good politics. Unfortunately for the faint-hearted, there is a military element which connects these terms, forming an ominous but timeless syllogism. That constitution which best affords the success of industry and national wealth invariably produces the greatest liberty; likewise, that constitution which best affords liberty produces the greatest industrial success and national wealth.

THAT THE PROFUSION OF PROPERTY AND ECONOMIC SAFEGUARDS IN THE CONSTITUTION PROVES THAT THEY ARE FUNDAMENTAL TO ITS SCHEME OF LIBERTY

Respondent argues that we ought not consider economic matters in our investigation of American justice, for economic rights are not fundamental to the constitution's scheme of liberty. We disagree, since they are essential to that scheme and to the fab-

⁴⁴⁷ *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82 (1942).

ric of the constitution itself. In fact, the profusion of property and economic safeguards in the constitution proves that they are intrinsic to its design. The commerce power takes its place among seven other enumerated protections of private commerce and industry, all of which are essential to liberty. The first of these is the bankruptcy clause,⁴⁴⁸ which allows Congress to “establish...uniform laws on the subject of Bankruptcies throughout the United States.”⁴⁴⁹ Second is the coinage clause, which gives Congress the power “To coin Money, regulate the value thereof, and foreign Coin, and fix a standard of Weights and measures.”⁴⁵⁰ Third is the patents and copyrights clause, which gives Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Fourth is the contract clause, which insures that “no State shall...pass any...law impairing the obligation of contracts...” Fifth are the non-discrimination in shipping and trading clauses, which insure that “no tax of duty shall be laid on articles exported from any state, [and] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.”⁴⁵¹ Sixth are additional shipping and trading protections stating that “no state shall, without the consent of Congress, lay any imposts or duties on imports or exports...[or] lay any duty on tonnage.”⁴⁵² Seventh is the takings clause, which states that private property shall not “be taken for public use, without just compensation.”⁴⁵³ Together with the commerce clause, these form eight explicit mandates to protect and encourage free enterprise, private property, industrial growth, and free trade. Respondent would have us avert our gaze from the fact that they have often warped and bent these economic safeguards into powers to retard and impede industry, or marginalized them into complete irrelevancy. This we cannot do.

The constitution of 1787 adheres to the realization that liberty cannot exist apart from economic and industrial might, privately held in an environment of political security. Liberty thrives due to the bilateral symbiosis of capitalism and martial strength, which are indispensable to world-class power and long-term national success. It is this point which the socialist and *modern* liberal refuse to digest, which they spit up in horror. It cannot be, they say, that the source of political stability and public welfare derive from the greedy machinations of private industry and the sadistic predilections of military forces. This, they claim, was Jefferson’s cry. They are correct that such was his cry; they are wrong that his point of view prevailed in the Constitution. It didn’t. The *Federalist* viewpoint did, and *that* is the organic structure of Respondent’s nation. Unfortunately, their emotions, like Jefferson’s, usually distract their minds from any thorough consideration of either the causes of the wealth of nations or the principles of national defense.

The beliefs of the founding fathers, while not wanting in theoretical origin, were also derived from the pains of practical experience. They had observed the effects of

⁴⁴⁸ Adam Thierer, *The Delicate Balance*, Chapter II, Part I, with the exception of the takings clause, which he omitted.

⁴⁴⁹ *The Constitution of the United States*, Article I, Section 8, Clause 4

⁴⁵⁰ *The Constitution of the United States*, Article I, Section 8, Clause 5

⁴⁵¹ *The Constitution of the United States*, Article I, Section 9, Clauses 5 and 6

⁴⁵² *The Constitution of the United States*, Article I, Section 10, Clauses 2 and 3

⁴⁵³ *The Constitution of the United States*, Fifth Amendment

arbitrary power upon economic health, often in the most personal of contexts, and hence were acutely interested in averting the impairment of American industry. The structure of the federal constitution delivered the nation from these fears for nearly one hundred and fifty years, until the New Deal and postwar eras of the twentieth century. It was then that Presidents Franklin Roosevelt and Lyndon Johnson, empowered by Congresses dominated by their own factions, imposed their grotesque strain of socialistic political theory upon the American marketplace. This remark would sound trite were there no judicial record which confirms it, no carefully worded opinions which explain and defend it. The original intention of boosting commerce gave birth to the eight commerce-enhancing provisions already mentioned, but it was eventually hammered into an instrument of commercial regulation and oppression, inimical to the end for which it was created, for which alone it would have been and ought to be tolerated. Thus, we still find for the Petitioner, that Respondent has created an unjust system of government by exercising an unlimited commerce power. In short, we hold that the proliferation of free-enterprise language in the constitution is more than sufficient to qualify economic rights as sufficiently present in the “traditions and conscience of [the] people...so rooted as to be ranked as fundamental.”⁴⁵⁴

THAT THE CONSTITUTION’S PROPERTY AND COMMERCE SAFEGUARDS ARE NOW USED TO DESTROY PROPERTY AND RETARD COMMERCE

Respondent claims that the numerous protections of property and commerce in the constitution do not prove that there is any latent economic theory in the constitution, and that America could constitutionally choose for itself whatever economic system it likes. Respondent cites its own supreme court’s Justice Holmes, who claimed, “a constitution is not intended to embody a particular economic theory...[even one] of laissez faire.”⁴⁵⁵ We are aware of the illustrious roots of this idea, and we must say that it does not impress us or tend to change our mind. Holmes’ statement was a complete mistake, for politics is economics. All constitutions contain an implicit economic theory, and America’s contains one so blatant, so graphic, as to be unmistakable. The constitution fully assumes and could not operate without a capitalistic system of free enterprise. In proof of this, we note that Marxism is almost certainly unconstitutional under America’s constitution.⁴⁵⁶ One need but consider several explicit provisions of the American constitution and then observe how they are directly contradicted by Marx:

(The Constitution) “No person shall be...deprived of life, liberty or property without the due process of law; nor shall private property be taken for public use without just compensation.”⁴⁵⁷

⁴⁵⁴ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁴⁵⁵ *Lochner v. New York*, 198 U.S. 45 (1905) (Justice Holmes Dissenting).

⁴⁵⁶ Gerald Gunther and Kathleen Sullivan, *Constitutional Law*, 13th Ed. Chapter VIII, Section I, Part C.

⁴⁵⁷ The Constitution of the United States, 5th Amendment.

(Marx) “the theory of the communists may be summed up in a single sentence: Abolition of private property.”⁴⁵⁸

(The Constitution) “nor shall any *state* deprive any person of life, liberty, or property without due process of law.”⁴⁵⁹

(Marx) “You reproach us with intending to do away with your property. Precisely so; that is just what we intend.”⁴⁶⁰

(The Constitution) “The right of the people to be secure in their persons, papers, houses, and effects from unreasonable search and seizure shall not be violated...”⁴⁶¹

(Marx) “Communists everywhere support every revolutionary movement against the existing social and political order of things...[and] they openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions.”⁴⁶²

(The Constitution) “No preference shall be given by any regulation of Congress or revenue to the ports of one state over another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.”⁴⁶³

(Marx) “[The bourgeoisie] has set up that single, unconscionable freedom—free trade.”⁴⁶⁴

(The Constitution) “nor shall any state...deny to any person within its jurisdiction the equal protection of the laws.”⁴⁶⁵

(Marx) “The immediate aim of the communist party is...formation of the proletariat into a class, overthrow of bourgeois supremacy, [and] conquest of political power by the proletariat.”⁴⁶⁶

This sketch shows that Marxism opposes the constitution’s inherent economic system. Anyone who believes that the constitution embodies no economic system must explain how the above Marxist tenets do not violate the 5th, 14th, and 4th amendments, as well as Article I, Section IX, a task impossible without recourse to sophistry.

The vivid economic theory inherent in the Constitution was also emphasized by Hamilton and Jay in *The Federalist*. These proponents of the American Federal Constitution, in the most explicit and passionate terms, argued that the constitution safeguarded the commercial and manufacturing needs of the several American states, a point discernible even by the clumsiest reading of *The Federalist*. For example, in number seven, Hamilton argues that the new constitution would reduce commercial antagonisms, protect the sanctity of contracts, result in freer interstate trade, and generally ease the extension and retirement of debt instruments. This is a blatant

⁴⁵⁸ Marx, *The Communist Manifesto*, Part II.

⁴⁵⁹ *Constitution of the United States*, 14th Amendment.

⁴⁶⁰ Marx, *The Communist Manifesto*, Part II.

⁴⁶¹ *Constitution of the United States*, 4th Amendment.

⁴⁶² Marx, *The Communist Manifesto*, Part IV.

⁴⁶³ *Constitution of the United States*, Article I, Section IX.

⁴⁶⁴ Marx, *The Communist Manifesto*, Part I.

⁴⁶⁵ *Constitution of the United States*, 14th Amendment.

⁴⁶⁶ Marx, *The Communist Manifesto*, Part II.

correlation of constitution and economics. Again, in *Federalist* twelve, he explains that the new constitution will tremendously augment commerce, and thus render taxation at once easier and less odious. In fact, the primary purpose of the new constitution was to remedy the fact that the old one was destroying commerce.

Far from being silent on economics, the American constitution *is* an economic system, one of free enterprise and private property. Justice Holmes' inexplicable opinion to the contrary, repeated so often since, is intellectually appalling; it leaves the student of political theory, trained to an understanding of both constitutions and economics, dumbfounded. We have laid the proofs for this already, but there are more, and we must not stop until the combined weight of each is fully appreciated by the Respondent.

THAT CONSTITUTIONAL FORMATS ARE INHERENTLY ECONOMIC ARRANGEMENTS, HENCE ECONOMICS AND CONSTITUTIONAL THEORY ARE INSEPARABLE

Respondent again objects that its property treatment is irrelevant to the issue of just constitutions and insists that it cannot be unjust merely for having debauched property rights in a socialist manner. Respondent demands that economics is unrelated to the just design of states and their formation, the latter being very obviously political, not economic. We disagree. Economics and politics are the same subject and cannot be separated. The formation of states, while seemingly the ultimate political act, can just as easily be characterized as an economic act. For example, when discussing the origins of cities in the *Republic*, Plato states that political association is intrinsically an economic undertaking:

[T]he origin of the city, then...is to be found in the fact that we do not severally suffice for our own needs...As a result of this, one man calling in another for one service and another for another, we, being in need of many things, gather many into one place of abode as associates and helpers, and to this dwelling together we give the name city or state...And between one man and another, there is an interchange of giving, if it so happens, and of taking, for each supposes such to be better for himself...Now the first and chief of our needs is the provision of food for existence and life...The second is housing, and the third is clothing and the like.⁴⁶⁷

Thus, Plato held that society's political formation itself was an economic act, a step in each individual's production of goods and services for himself. The particular structure of the city can enhance or diminish this production, and thus the format or constitutional nature of the city is intrinsically an economic arrangement.

Plato asserted that our coalescence into cities and states was motivated by a desire to secure food, shelter and clothing. This is very different from later theorists like Hobbes and Locke, who asserted that personal safety was the motive. When the mo-

⁴⁶⁷ Plato, *Republic*, at 369 C-D.

tive is portrayed as safety, it appears less and less economic in nature. Consequently, moderns are easily deceived into ignoring the economic nature of the origin of states and of constitutions. But Plato's assessment must be more carefully considered, for our individual safety is but a general term, the specifics of which require precisely what Plato said, namely attainment and retention of food, shelter, and clothing. We cannot have any personal safety if the body is killed by starvation and exposure, and it makes no difference if this results from our own inefficiency or another's theft or violence. The privation is the same and the result is the same: we die.

People are principally motivated to form communities by the risks of starvation and exposure. Then, there is the need of companionship. The physical threat of human injury to their bodies or property is but a small factor. A fellow human may assault you now and then, and only sometimes with success, but the stomach will assault you hourly, and it cannot be resisted, only appeased. Likewise, the elements assault you at all times. Humanity exists in this unrelenting vice of physical and economic need, as do all life forms, and its unique response is, in a word, civilization. Nevertheless, issues of physical violence tend to obscure the wider, economic aspects of personal safety. Thus, Plato's formulation is enlightening, for it shows that political organization can just as easily be depicted as an economic act, and even the provision of security from violence can be so described. The economic description is simply an alternative way of describing a political occurrence. They are actually the same thing. This is why we say that an economic injury is a political one, and vice-versa.

This origin of the social contract establishes that economic rights, not merely those described as political, are the ultimate moral facts upon which rests the social rights of humankind.⁴⁶⁸ This is, perhaps, going farther into the subject than jurists or political scientists find comfortable. But, they are comfortable with the results of this type of inquiry, namely that there are basic rights which define the proper limits and requirements of government. We have here shown that these rights are not, as previously supposed, merely the right to freedom from violence and rapine. They can also be described as economic rights, and these rights are intrinsically part of the constitution. Respondent has ignored them, however, and in this respect, they are liable to the Petitioner on the charge of injustice.

We remind that the ancients denominated the basic forms of constitutions according to an economic taxonomy, as earlier explained. The political rule of the one, the some and the all are invariably the rule of the rich, the middle class, and the poor, respectively. This economic coefficient of constitutional structure forms the mechanism whereby the separation of powers is able to operate, as those without material substance are afforded a check upon the wealthy. In this way, too, it should be clear that economics is only another way of discussing politics. They are one in the same.

⁴⁶⁸ Compare Hobbes and Locke, especially as described by Strauss in *Natural Right and History*, Chapter V, Section A.

THAT ECONOMIC LEVELING DESTROYS THE SEPARATION OF POWERS

Petitioner also alleges that Respondent's disparagement of economic rights includes attempts at social and economic leveling. We agree that leveling in its most extreme sense destroys the separation of powers, the basis of all liberty and justice. By easy analogy, excessively redistributive social welfare programs violate the separation of powers as much as would an elimination of the executive branch. Leveling destroys the power of the monarchic and aristocratic elements of the harmonic constitution and increase the numbers and power of the remaining poor. Marx's desire, as quoted above, to subject all classes to a dictatorship of the proletariat, violates the separation of powers since it explicitly gives the poor a political monopoly. The result is an unstable, unworkable constitution, namely pure, broad Aristocracy. Thus, principles of leveling, while proceeding from benevolence and a love of abstract equality, actually destroy liberty and unbalance the only form of government which can create and insure a reasonable equality. We remind Petitioner, however, that they have already charged the Respondent with allowing excessive concentrations of wealth, and therefore, they must set forth in greater detail how it is that Respondent is guilty at the same time of leveling. We do not find the idea at all impossible; but we require a fuller complaint before we will be willing to consider it.

THAT LIBERTY CANNOT EXIST WITHOUT COMPETITIVE CAPITALISM, AND TYRANNY CANNOT EXIST WITH IT

Respondent next defends its curtailment of economic rights by arguing that justice requires liberty, not capitalism; that capitalism has nothing to do with liberty, equality, or justice; and that the founding fathers, in establishing the constitution, did not intend or create any particular economic theory. We disagree. We have already explained that economics and politics are the same thing. Nevertheless, since Respondent has apparently not understood this, we will continue to show the relationship in greater detail. We will start by making the point that liberty requires capitalism, and capitalism requires liberty. Both must be conjoined. Respondent has erred in trying to separate them. Capitalism was and is fundamental to Respondent's constitution. Second, inseparability of liberty and capitalism was underscored by political thinkers long before the founders incorporated such concepts into the constitution. From the familiar works of Montesquieu, Burke, Sidney, Trenchard, and Gordon, the founders deeply internalized the idea that free-market economics and liberty were inseparable. In *Cato's Letters*, Trenchard and Gordon wrote that political systems were intrinsically anchored in economics: "The first principle of all power is property, and every man will have his share of [liberty] in proportion as he enjoys property...This is natural power, and [it] will govern and constitute the political [power]." ⁴⁶⁹ They proceeded to elucidate the connection between liberty and economics in an entire article entitled, "*Trade And Naval Power The Offspring Of Civil*

⁴⁶⁹ Trenchard and Gordon, *Cato's Letters*, No. 84. Saturday, July 7, 1722.

Liberty Only, And Cannot Subsist Without It."⁴⁷⁰ Here they observed the utter interdependence of commerce and free government:

[Trade] cannot breathe in a tyrannical air...but give her gentle and kind entertainment, [and] she is a grateful and beneficent mistress; she will turn deserts into fruitful fields, villages into great cities, cottages into palaces, beggars into princes, convert cowards into heroes, blockheads into philosophers, will change the coverings of little worms into the richest brocades, the fleeces of harmless sheep into the pride and ornaments of kings, and by a further metamorphosis will transmute them again into armed hosts and haughty fleets...[But when fated to suffer under] certain oppression, no men will embark large stocks and extensive talents for business, breed up their children to precarious employments, build forts, or plant colonies, when the breath of a weak prince, or the caprice of a corrupt favorite, shall dash at once all their labors and their hopes; and therefore it is impossible that any trade can subsist long in such a government...trade cannot long subsist, much less flourish, in arbitrary governments.⁴⁷¹

Hume, yet another contemporary of the founding fathers, made the same point. In his words, "...commerce can never flourish but in a free government...If we trace commerce in its progress through Tyre, Athens, Syracuse, Carthage, Venice, Florence, Genoa, Antwerp, Holland, England, &c. we shall always find it to have fixed its seat in free governments."⁴⁷² The progress of modernity has but amplified this truism. The greatest commercial and industrial nations continue to be those with the freest and most stable constitutions.

But Hume, Trenchard and Gordon were not alone in this sentiment. Montesquieu was no less ardent in announcing the same interdependency of liberty and capitalism. Regarding what he termed the spirit of commerce, Montesquieu identified the naturally salutary and liberty-enhancing effects of business. "The natural effect of commerce is to lead to peace...The spirit of commerce produces in men a certain feeling for exact justice...By contrast, total absence of commerce produces...banditry..."⁴⁷³ Montesquieu further insisted that certain economic systems were intrinsic to certain constitutions:

Commerce is related to the constitution. In government by one alone [the constitution] is ordinarily founded on luxury...In government by the many, it is more often founded on economy...This kind of traffic concerns the government of the many by its very nature, [but only concerns] monarchical governments on occasion...Yet the greatest enterprises are undertaken in those states which subsist by economic commerce, and they show a daring *not to be found in monarchies*: here is the reason for it...In short, one's belief that one's prosperity is more certain in these states

⁴⁷⁰ Trenchard and Gordon, *Cato's Letters*, No. 67. Saturday, February 24, 1721.

⁴⁷¹ Trenchard and Gordon, *Cato's Letters*, No. 67. Saturday, February 24, 1721.

⁴⁷² Hume, *Of Civil Liberty*, Essay XII.

⁴⁷³ Montesquieu, *The Spirit of the Laws*, Part IV, Book XX, Chapter II.

makes one undertake everything, and because one believes that what one has acquired is secure, one dares to expose it in order to acquire more; the only means for acquisition are through risk; now men expect much of their fortune. I do not mean that monarchies are totally excluded from economic commerce, but they are less inclined to it by its nature; I do not mean that the republics we know are entirely without the commerce of luxury, but it is less related to their constitution.⁴⁷⁴

Montesquieu continues to hammer his point by observing that in kingdoms, wherever there is a store of wealth, it is invariably seized by a monarch when it becomes noticeably large.⁴⁷⁵ This furthers the point that Monarchy knows no stable trade or private finance. Let us also repeat Montesquieu's reasoning concerning "How exchange hampers despotic states."⁴⁷⁶ He shows in the example of Russia that commerce is itself a contradiction to despotism, for the subjects of that despotism were unable to alienate goods or effect transactions without permission. Thus, economics was clearly intrinsic to constitutions in Montesquieu's eyes. He came within a hair's breadth of noticing that capitalism grows out of democratic principles and that economics *is* politics. Every constitution implies some economic system, and those of the free governments by nature imply private property, free trade and brisk commerce. This is the relationship which the United States Supreme Court has denied. This is the relationship which Respondent inexcusably says is not sufficiently present in the "traditions and conscience of [its] people...so rooted as to be ranked as fundamental."⁴⁷⁷ Therefore, Respondent has resolved to allow property rights and economic rights to be constitutionally violated by its state and federal governments so long as they have any 'minimally rational' reason to do so.⁴⁷⁸

Moreover, in the context of governing subordinate states or colonies, economic rights and liberal government are no less mutually necessary; a point particularly germane to debates concerning the preservation of property rights in a federalist system such as the United States. With reference to colonies, Trenchard and Gordon observed that arbitrary governments, ruling by force, invariably experience less economic success at planting colonies than do free states, because "Force can never be used...without destroying the colonies themselves...Any body of troops considerable enough to awe them, and keep them in subjugation, under the direction of too needy a governor...will soon put an end to all planting, and leave the country to the soldiers alone."⁴⁷⁹

However, lest there remain any doubt that the American constitution implicitly contains a free-market ideology, one which is deeply rooted in the traditions and conscience of the people, let us observe the statements which were advanced by Edmund Burke and Algernon Sydney, both of whose works enormously influenced the found-

⁴⁷⁴ Montesquieu, *The Spirit of the Laws*, Part IV, Book XX, Chapter IV.

⁴⁷⁵ Montesquieu, *The Spirit of the Laws*, Part IV, Book XX, Chapter X.

⁴⁷⁶ Montesquieu, *The Spirit of the Laws*, Part IV, Book XX, Chapter XIV.

⁴⁷⁷ See footnote 143 *supra*.

⁴⁷⁸ *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819).

⁴⁷⁹ Trenchard and Gordon, *Cato's Letters*, No. 106. Saturday, December 8, 1722.

ing fathers.⁴⁸⁰ In criticizing the revolutionary government in France, Burke observed that the flaw in France's supposed liberty derived from the people's paradoxical belief that their liberty was perfected to the very degree their property was rendered insecure.⁴⁸¹ We have noted that the pure constitutions are based on financial classes, these being the rich, the middle class, and the poor, and that the mixed constitution is thus recognizable as one in which financial classes are balanced against each other. Burke addresses and compliments this phenomenon, further establishing the general knowledge that constitutions contain implicit economic systems. In his words,

[In] Monarchy...[the financial] classing of the citizens is not of so much importance as in a Republic. It is true, however, that every such classification, if properly ordered, is good in all forms of government, and composes a strong barrier against the excesses of despotism, as well as it is the necessary means of giving effect and permanence to a Republic. For want of something of this kind, if the present project of a Republic should fail, all securities to a moderated freedom fail along with it; all the indirect restraints which mitigate despotism are removed...⁴⁸²

Thus did Burke, like his contemporaries, mark out an explicit relationship between constitutions and economic class systems. From Burke, as from the others, the founding fathers gleaned hints that politics, economics, and justice are inseparable subjects; that by every calculus liberty requires private property; that without property rights, freedom and liberty are rendered a practical impossibility. Respondent's disengagement of economic rights thus supports the Petitioner's claims of injustice.

Also, we must recall that the forces which cause constitutional revolution are intrinsically economic. We have already noted Harrington's maxim that when the property is monopolized by the party in power, revolution will be unlikely, but when distributed among those lacking political power, revolution will occur and power will inexorably flow to those gaining the property. This is why the people must have private property in a mixed constitution. Only then can they exercise any real power. We must recall that Harrington proved his maxim by citing the fact that military power proceeds from property. Those possessing property are ultimately in control of the military power of the people. Although government depends entirely upon the sword, without hands, swords are so much useless iron, and these hands are of the people, which has a great belly and must be fed ultimately by those with the property. Thus, the parties in control of the property inherit the military power, and the political power is never long to follow, the shift being, in reality, a revolution. In this sense then, too, namely in coming-to-be and ceasing-to-be, constitutions are inherently economic arrangements.

Thus, constitutions embody economic theory. Politics is economics. In the face of these endless and explicit links between constitutions and economics, advanced by

⁴⁸⁰ Adams, J., *Letter to Jefferson, September 18, 1823*. See also, Minutes of the Board of Visitors, University of Virginia, March 4, 1825.

⁴⁸¹ Edmund Burke, *Reflections on the Revolution in France*. Part I, Chapter V, Section I.

⁴⁸² Edmund Burke, *Reflections on the Revolution in France*. Part II, Chapter II, Section II

writers who even the Respondent would acknowledge as authoritative on the subject, Respondent's arguments to the contrary grow ever more outrageous. To contend that the founding fathers did not believe economics to be implicit in the constitution approaches the absurd. Thus, as we hold that justice requires both liberty and capitalism, and that the founding fathers, in establishing Respondent's constitution, explicitly adopted capitalism through that document.

THAT CAPITALISM REQUIRES DEMOCRACY AT FIRST, BUT GRADUALLY CREATES MONARCHY, CAUSING ITS OWN EXTINGUISHMENT

Capitalism and Liberty are indeed conjoined. However, this does not mean that pure capitalism is democratic. It requires Democracy as a prerequisite. Capitalism needs Democracy, but it is not democratic. It is by nature an aristocratic thing, and if left entirely unregulated, it will naturally convert Democracy into an Aristocracy and finally Monarchy. It needs Democracy at first because the market mechanism requires the transactional free choice of each individual. This is democratic, as each individual rules directly on his own behalf when making purchasing decisions. However, the entities of capitalism, the players, are not democratically organized. They progressively become mass units, partnerships, trusts, corporations, call them what you will, and they are operated according to hierarchical, not democratic principles. Even with the popular restraint achieved by shareholder arrangements, the idea of corporate Democracy is a fiction. These entities gradually devour the remaining competitors and then one another. The Democracy which once permitted capitalism's birth thus disappears into the bowels of the entities capitalism creates, leaving an Aristocracy of business enterprises. Their power is political power, and thus their aristocratic character floods into the constitutional scheme and submerges the popular and monarchic elements. The mixed constitution then ends and Aristocracy supervenes, destroying capitalism and leading finally to Monarchy, after which the constitutional cascade reappears.

To prevent this, capitalism must not be permitted to self-destruct; its aristocratic tendencies must be offset by legislation. The economic term for Aristocracy is oligopoly. Preventing Aristocracy in capitalism means fighting oligopoly and thereby safeguarding competition. Competition, then, must be fostered by laws which prohibit oligopoly, monopoly, restraint of trade, unfair trading practices, etc. Labor law also plays a role, for it restrains the power of capital and management and benefits that of labor, or the people. Anti-discrimination laws, too, play a role in reducing aristocratic tendencies as opportunities are spread wider throughout society. Tax and inheritance laws may also reduce the cumulative effect of capital, if not carried too far.

Such procedures will arrest capitalism's aristocratic tendencies but also retard economic growth. This, in turn, reduces the state's power to compete internationally and defend itself militarily. These costs must be factored into the decision regarding how much capitalism is to be restrained, for an overweening regulatory scheme can easily destroy the state entirely. This does not mean that all regulations retard capitalism. Some tend rather to restore its dynamism and competitive health. We must note only that although the cumulative effect of regulation may threaten the state's existence, some regulation is needed to counteract the aristocratic tendency of capitalism.

For pure capitalism at first requires Democracy, but once established turns it first into Aristocracy, and finally Monarchy, the prevention of which requires sacrifices in economic and military efficiency.

THAT CAPITALISM CREATES THE MIDDLE CLASS ON ITS WAY THROUGH ARISTOCRACY AND LARGELY DESTROYS IT UPON REACHING MONARCHY

Capitalism destroys itself at the end of its journey. But along the way it sweeps broad portions of the people into the aristocracy, creating what is called the great middle class. Just as capitalism creates the middle class, however, it ultimately destroys it, unless the middle class becomes aware of its danger and alters the regulatory environment so as to preserve the constitution. Otherwise, it will be powerless at last to prevent aristocratic consolidation of the business sector, the self-destruction of capitalism, and the final destruction of the middle class as the constitution transforms into pure Aristocracy and finally Monarchy.

The emergence of the middle class is a momentary phenomenon which, if preserved by timely regulation, proves hugely beneficial to liberty. This middle class is also a principle proof of the truism that competitive capitalism tends to equalize wealth, not concentrate it in a few individuals. As Freedman explained:

Capitalism leads less to inequality than alternative systems of organization and...has greatly lessened the extent of inequality...[as] measured by differences in levels of living between the privileged and other classes. [Capitalism has] freed the masses from backbreaking toil and has made available to them products and services that were formerly the monopoly of the upper classes, without in any corresponding way expanding the products and services available to the wealthy. Medicine aside, the advances...have simply made available to the masses of the people luxuries that were always available in one form or another to the truly wealthy. Modern plumbing, central heating, automobiles, television, radio, to cite just a few examples, provide conveniences to the masses equivalent to those that the wealthy could always get by the use of servants, entertainers, and so no...Non-capitalist societies tend to have wider inequality than capitalist, even as measured by annual income; in addition, inequality in them tends to be permanent, whereas capitalism undermines status and introduces social mobility.⁴⁸³

So, a capitalistic constitution creates a middle class and fosters dynamism between the rich, middle and poor. It creates the middle class mainly from the poor, thereby tending to reduce poverty. This middle class also plays an important role in the tripartite separation of powers depicted by the ancients, the off-setting rule of the rich, middle, and poor classes, which is a component of the harmonic constitution. For this reason, competitive capitalism is essential to the harmonic constitution; it is a part of it.

⁴⁸³ Friedman, *Capitalism and Freedom*, Chapter X.

The rise of the middle class is a temporary phase in capitalism's growth, one which is later undone. Pure capitalism results in a monarchic situation, as we have seen, and it destroys the middle class as it approaches that end. This correspondingly impairs the harmonic constitution by eliminating two elements of the per-capita separation of powers. So it can be seen that capitalism contains by definition a democratic and an aristocratic element. It is democratic insofar as the free market operates, and aristocratic as the players cooperate to compete.

THAT PROTECTIONS OF PROPERTY LOGICALLY PRECLUDE REGULATION OF LABOR, SINCE LAWS THAT REACH LABOR, REACH PROPERTY

Petitioner next alleges injustice in Respondent's labor laws. We must look at this carefully. In no other place are political and economic freedoms so obviously correlated as in Labor. Labor can be easily understood as either a political or an economic event. It can be described as either being an operation of the will or a factor of production. Life and labor are inseparable, as are labor and property; these last two being related as efficient and material causes, like time and space, like the verb and the noun. Laws that reach labor, therefore reach property by definition. Trenchard and Gordon touch precisely on this when they observe the importance of the freedom of labor. They explained that this freedom was, along with property, a hallmark of free nations.

Where there is liberty, there are encouragements to labor, because people labor *for themselves*: and no one can take from them the acquisitions which they make by their labor: [Where there is liberty,] there will be the greatest number of people, because they find employment and protection... The people will be able to work cheapest, because less taxes will be put upon their work... the interest of money will be lower, and the security of possessing it greater, than it can ever be in tyrannical governments, where... property... must depend on the humor of a prince... For these reasons, trade cannot be carried on so cheap as in free countries; and whoever supplies the commodity cheapest, will command the market.⁴⁸⁴

Despite these truths, Respondent has regulated labor to an extreme degree. Unionization and Labor Laws, minimum wage and hour laws, and the end of at-will employment, all retard people's rights to their own labor. We have seen that some regulation will be necessary to avert the aristocratic tendency of capitalism. However, the Respondent has likely crossed the boundary into injustice. An American cannot work for the wages she desires; there are statutory limits. An American cannot work the hours he desires; there are legal impediments. They cannot work at the occupation they desire without very often being required to join oppressive guilds or unions or obeying intricate and exclusionary licensing procedures. Respondent has not justified

⁴⁸⁴ Trenchard and Gordon, *Cato's Letters*, No. 64. Sat. February 3, 1721. Italics supplied.

these in terms of the health of capitalism. However, we give them leave to do so before rendering judgment on their system of labor regulation.

THAT THE DEBAUCHMENT OF PROPERTY TENDS TOWARD MILITARY WEAKNESS, NATIONAL VULNERABILITY, AND ULTIMATELY A LOSS OF LIBERTY

We also warn Respondent of the injustice which will proceed from undermining the national security of the United States through their policy of debauching property rights. The confluence of free-market economics and constitutional liberty was earlier shown to accrue to the military strength and martial virtue of a nation, adding to the durability and permanence of the state, for those who possess freedom and property are motivated to preserve both with their lives, unlike the abject members of autocratic states. Moreover, the operations of trade naturally inure to a mighty industry and a preeminent maritime power, as will be examined in greater detail later.⁴⁸⁵ Without property, the motivations towards martial virtue and industrial excellence are destroyed, and the state is correspondingly weakened in its fists and its minds. From these considerations, the founders were well aware that constitutions embody economic theory, and that the debauchment of property tends toward military weakness, political instability and a loss of liberty. We implore Respondent to heed this lesson carefully, for failure to do so will result in catastrophes far beyond the mere loss of this case to Petitioner.

THAT THE CONSTITUTIONAL RIGHT TO PRIVACY INCLUDES A CONSTITUTIONAL RIGHT TO PROPERTY

There is another reason why Respondent's disparagement of property rights creates injustice. Respondent's own logic requires that they recognize a constitutional right to property. Despite all the reasons which argue against doing so, the United States Supreme Court has read out of the constitution any fundamental economic or property rights, as announced in the case of *Carolene Products* and its progeny, but by the same logic it has read into the constitution a right of privacy.⁴⁸⁶ We have already condemned such licentious use of the due process clause. But, to be logically consistent, if the Respondent reads privacy into the constitution they must do so for property. Economic rights are basic components of privacy. This is an aspect of the broad link between liberty and capitalism and the inseparability of economics and politics. We have exhaustively proved that economic rights are implicit in constitutions, that they originate in the very foundations of American society, and that they have been unreasonably denigrated by seventy-five years of American jurisprudence. These verities are not to be cast aside. But the Respondent has turned a deaf ear to

⁴⁸⁵ Trenchard and Gordon, *Cato's Letters*, No. 65. Saturday, February 10, 1721. Also, Mahan, *Mahan On Naval Strategy*, Chapter II, Section V. "The tendency to trade, involving of necessity the production of something to trade with, is the national characteristic most important to the development of [naval] sea power."

⁴⁸⁶ *United States v. Carolene Products Co.* 304 U.S. 144 (1938).

these realities and prefers instead to adopt other rights as fundamental, one of them being the right to privacy.⁴⁸⁷

This right to privacy derives from the substantive due process theory of constitutionality. As we noted earlier, the substantive due process standard has often been dangerously articulated as including those rights “which lie at the base of all our civil and political institutions,”⁴⁸⁸ or alternatively, those rights which are “of the very essence of a scheme of ordered liberty,”⁴⁸⁹ and also, rights which constitute a “principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.”⁴⁹⁰ We also noted the infinite augmentation that this vague terminology afforded to the court’s judicial review power. In addition to this list of constitutionally protected fundamental rights are others derived from the so-called ‘penumbral light’ of other explicit constitutional guarantees, which collectively make privacy a logical prerequisite to America’s current structure of liberty. In the court’s words, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁴⁹¹ Upon this penumbral emanation theory, the right to privacy has been “read into” the constitution, although it does not explicitly appear in the document or its legislative history. If privacy is to be accorded such an extreme degree of protection in our system, it is worth noticing that economic rights in general and property rights in specific are indispensable to any meaningful concept of privacy. Respondent was moved to protect privacy because one could not be secure in their persons, papers, houses, and effects, as per the 4th amendment, without privacy. We point out that one cannot be secure in their persons, papers, houses and effects without persons, papers, houses and effects. This demonstration should lead the Respondent to finally protect the sanctity of property and economic rights with the same zeal as privacy rights.

If property is to be read into the right to privacy, we must briefly review the definition of property and review its general operation. Only then can we responsibly establish its critical relationship to privacy. This returns us to our conclusions regarding the equivalency of politics and economics.

Perhaps nobody has ever spoken so accurately about the nature of property as did Rousseau when he pronounced that “the first man who, having enclosed a piece of ground, bethought himself of saying *this is mine*, and found people simple enough to believe him, was the true founder of civil society,”⁴⁹² for this is the truest description of the nature and origin of property to be found in all economic literature. It does not matter whether events proceeded in this historical manner, for the critical point is that property derives from one’s power over a thing; property is that which one controls, to the extent of that control. We have examined this relationship and the general nature of property elsewhere and were able to make note of its origin and several of its primary characteristics.⁴⁹³ Let us review these.

⁴⁸⁷ *Boyd v. United States*, 116 U.S. 616, (1886). See also, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969).

⁴⁸⁸ *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).

⁴⁸⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁴⁹⁰ *Snyder v. Massachusetts*, 291 U.S. 97, 105 54 S.Ct. 330, 332 (1934).

⁴⁹¹ *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965).

⁴⁹² Rousseau, *An Essay on the Origin of Inequality Among Men*, Part II.

⁴⁹³ *The Sophomoric Discourses*, Book V, Chapter IV, and Book III, Chapter II.

THAT PROPERTY IS PROVEN BY ITS NATURE TO BE AS INTRINSIC TO LIBERTY AS ARE PRIVACIES OF THOUGHT AND EXPRESSION.

The origin of property is the phenomenon of self-awareness. This becomes clear when one considers that self awareness makes a person cognizant of his own existence, that he is his person, and immediately makes the elements of understanding, his thoughts, his first and foremost property, as he possesses and controls them absolutely. It is in this manner that control was shown to be the hallmark of both identity and property, and that these two terms are actually synonymous. As control related to identity, we derived that our identity is ultimately the sum total of the things which we control, and that a creature's identity could be determined by examining the extremes of its influence on all matter and energy in the universe. As control related to property, we observed that property referred to things which are ours, and such things are those over which we exercise the most control. As control diminishes, property diminishes, and therefore, our primary property is mental,⁴⁹⁴ as here we have the most control, our secondary property is bodily, since we have somewhat less control over the body than the mind, and the external world beyond our bodies comprises the set of things capable of being tertiary property, if such can be brought under our control. We confess that what we call tertiary property, most people call simply 'property,' namely, reality and personality.

Now, this appears to be a far cry from the legal definitions of property, which revolve around the ability to exclude. The power to exclude is said to legally distinguish that which is property from that which is not.⁴⁹⁵ Our definition is not, however, in conflict with this, although it does appear to contradict Cohen's dialogue on property, which alleges that an example of propertyless wealth might be a valuable intellectual discovery, an idea.⁴⁹⁶ This cannot but be property, as we have shown. Despite this mistake, Cohen is correct in his conclusion that there may be a propertyless wealth. That which is controllable though not yet controlled is propertyless wealth.

However, the power to exclude is merely an instance of *control*, which is what we hold to be the hallmark of property. Were property confined merely to things from which we may exclude others, then our thoughts would not be our property, for though we control them in myriad ways, we do not have an ability to exclude others from them. The exclusion of others is a physical result of our biological nature, not a choice we make, as there is no way for another's consciousness to come into ours, although some assert this type of entry metaphorically, such as when they say we shut others out by hiding our thoughts. Our power over our thoughts is the very opposite, namely, the ability to send thoughts to others by means of transferring them to other consciousness via some physical medium like sound or pictures, words or symbols. Strictly speaking, there is no proactive exclusion possible when we speak of thoughts. Nobody can access them directly, but not because we exclude. One cannot exclude others from areas intrinsically inaccessible. Yet these are our dearest property, the things which we cherish, the things which we sanctify and protect with laws of pri-

⁴⁹⁴ Spencer, *Social Statics*, Part II, Chapter XI.

⁴⁹⁵ Felix Cohen, *Property and Sovereignty*, 13 Cornell L.W. 8-12, 14-30, (1927).

⁴⁹⁶ Felix Cohen, *Dialog on Private Property*, 9 Rutgers L. Rev. 357 (1954).

vacy and doctrines of toleration. Those who reject the classification of thoughts as property must wrestle with the fact that we say, "this is my belief, my opinion, my thought," or, "Hey, that was my idea!" We are not speaking metaphorically in these instances, but from our deepest understanding of our identity and our nature. They must equally admit that ideas are property even before they are embodied materially; a song was property before it was sung. The material embodiment is merely evidentiary in nature. The lack of physical existence of non-material property, such as an idea or a song, does not remove its essential property characteristic, namely, its being controlled. In Aristotelian terms, one can own the formal cause.

Surprisingly, Spencer came to the same conclusion, namely, that thoughts are property, through an opposite, utilitarian calculus. The generation of ideas in our mind affects nobody but ourselves, and thus we have an absolute claim to liberty of thought, and a property in our thoughts proceeds from that absolute right. We reach the same conclusion upon nearly opposite grounds, that our property is precisely our influence upon other things. The fact of property does not arise from its lack of effect on others, but rather from our effect upon the property. The hallmark of property being control, it could consist in anything which we might get under our control. The extent of our control, influence, and effect is the extent of our property. Technically, one "is" one's effects and one's influence. Thus, the extent of one's identity is the same as the extent of one's property.

Having identified what property naturally is, we must concede that claims to property form a different subject and address what property ought to be rather than what it is. The normative questions of property reside in the field of economics, which we have already shown to be political theory. Justice is, however, no less political theory, and hence we must admit that the investigation of what property 'is' is related to the question of justice and the ideal system of justice. This is obvious to all who debate the justice of economic classes, distributions of income, inheritance laws, and other economic rules and systems. We are not presently inquiring as to how property should be structured in society in order to maximize justice, but rather we are merely observing the fact that property fundamentally is a part of who we are; that property exists despite anybody's mere claim to the contrary; that it cannot be eliminated by socialist fantasies or the elliptical logic of communism. It exists despite any theory. Even Marx's theory of communism was his theory, his idea, thus originally his property. He could no more banish property than could he banish thought.

So defined, property rights are as intrinsic to liberty as are a person's thoughts; our thoughts, in fact, are property, at least what we have styled primary property. Obviously such property is absolutely private, and one could hardly claim that the Respondent has treated it otherwise. But now we must examine the relationship which obtains between tertiary property (personalty and realty) and privacy, for the Respondent fails to see the privacy ramifications of such property. Let us ask ourselves, can there be any privacy without tertiary property—without realty, without papers and effects? Without these, what is there left to keep private? We use the term papers and effects pointedly, so as to suggest the absurdity of being secure in them if government renders their existence scarce or unstable. Recall, the Fourth Amendment gives the people a right to be secure in their persons, houses, papers, and effects from unreasonable searches and seizures; and also recall that this security is said to impliedly

establish the right of privacy.⁴⁹⁷ Does this not assume that we might have houses, that we may own property, that we can write papers, that we might possess effects? Does this not assume the existence of privately owned property, the unreasonable seizure of which is destructive of our privacy? Thoughts are stored as memories. They erode, and thus require the permanency of material recordation, thus our papers. Without physical aid, our memories and thoughts are ephemeral in spite of our fondest love for them. To record them is to be secure in them. Hence we must be secure in our physical property in order to safeguard our private thoughts. Property is so implicit in the ability to enjoy the Fourth Amendment right to privacy that courts ought therefore to include property as a fundamental right emanating from the basic structure of our ordered liberty, and afford property rights the same level of judicial protection accorded to privacy rights. Respondent has failed to acknowledge the fundamental status of property rights, and the Petitioner is entitled to relief on this claim.

THAT SINCE PROPERTY IS SOVEREIGNTY, IT MUST BE ACCORDED THE SAME FUNDAMENTAL RIGHT STATUS AS NON-ECONOMIC RIGHTS

Petitioner further contends that Respondent has violated the inalienable sovereignty of the people by disparaging their property rights. We have footnoted the essay in which Cohen suggested that property may be a form of sovereignty. Under his formulation, such was the case since property entailed a power to exclude, which established a condition of servility upon those who need to use it but cannot without consent.⁴⁹⁸ This is striking, but it says nothing about sovereignty, since the power to exclude is had at the pleasure of some greater authority, and questions of sovereignty lie there, not in the delegated powers of that authority, which are parceled out among the masses in the form of so many rights to exclude. Again, he is not wrong in his conclusion, but merely mistaken in his calculus. Sovereignty and property are inextricably linked, rather, by our definition of property as things controlled, for such includes primarily and fundamentally the mind, the consciousness and thoughts of the individual, his power as an individual over himself. This is precisely the starting point of sovereignty, which Rousseau showed to reside inalienably in the individual.⁴⁹⁹ This we observed in our analyses of the both the role of consent in government and the principle of government as an aggregation of borrowed individual sovereignties. The individual is indefeasibly his own sovereign, which is to say that he is, simply, his own. This is a property formulation, and this is why property is a foundational element of sovereignty. This sovereignty, then, extends outward through all one owns, until it abuts the property of others. To the extent that the state disparages these rights, it disparages one's sovereignty. However, if the state itself perfectly represents them,

⁴⁹⁷ *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926). See also, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965).

⁴⁹⁸ Felix Cohen, *Property and Sovereignty*, 13 Cornell L.W. 8-12, 14-30, (1927).

⁴⁹⁹ Rousseau, *The Social Contract or Principles of Political Right*, Chapters I, IV, and VI.

it cannot disparage them in this way, since they will be acting on themselves. Thus, we shall require Petitioner to state her claims in terms of how such representation is flawed if she wishes to allege a disparagement of sovereignty. Petitioner is not wrong to draw the relationship between sovereignty and property. However, to make a claim about sovereignty, we require that it be made in terms of representative or direct rule, as a matter of procedure.

THAT DEBT IS A POWERFUL POLITICAL FORCE BECAUSE IT IS PROPERTY

Petitioner alleges that the Respondent is unjust in that that bankers and money-lenders have all the real power in the United States, proving it to be nothing but a plutocracy. We disagree. The political nature of debt proves that they do not monopolize American power.

Political power follows property, and thus it should follow debt, which is a kind of property. Debt therefore entails political power, and the larger it gets, the more powerful it becomes. But debt behaves in the opposite manner from most property, since power flows away from the debt owner and into the hands of the debtor, who by definition is not the property owner. It is therefore that debtors form a political force capable of explosive revolution if they become too large and too desperate. Thus, there is a paradox to be solved, for debt seems to be the only property that does not politically empower its owner, but rather its user.

Debt politically empowers not its holder, but rather the debtor, because it is non-possessory property, and the power of property is possessory. The possessory property is always worth more than the principal debt, which is the reason that debt requires interest. Interest can be seen as the excess political value of property possessed versus property lent. Thus debtors, not creditors, have the power of property. Insolvent debtors have lost this power, as they have lost possession of the property to the extent of their insolvency, but creditors have not recovered the power. Their reduction of power has become permanent. When money is lent, power is lent. An insolvent debtor's default reduces the power to zero, and the creditor and debtor are rendered equal. This results in revolution if the insolvent debtors outnumber the creditors, for debtors will then be the dominant property holders, owning themselves. This is the reason why ancient laws permitted the creditor to enslave the defaulting debtor. Not only was this the only satisfaction for the debt, it restored power to the creditor and averted the shift of political power to the debtors. This flows from our former conclusion that identity is property, and property is power. Insolvency leaves the insolvent with only the natural sovereignty they exercise over themselves. This power will preponderate if creditors are unable to collect debts. But it will also preponderate if debtors are numerous and creditors attempt to enslave or ruin them. Thus, as against numerous insolvent debtors, creditors are overpowered if they collect nothing, but also if they attempt to collect everything. They therefore must collect some intermediate sum in order to retain political power. Therefore, bankruptcy laws are established to accomplish just this, and the result is that each class is protected against political domination by the other.

Petitioner claims that there are exceptions to this, her brother's debt being a proof thereof. We agree. Usually debt empowers debtors. This principle is flipped on its

head, however, when the creditors are an organized military force. Borrowing from an army does not transfer power to the debtor, as the debtor borrows merely a means to create power and cannot do so to the detriment of an army but by the creation of yet another army, in which case the strength of the creditor is not impaired but perhaps only equaled or threatened. But borrowing money from an army is uncommon, unless from the officer class, which is rather the type of debt which empowers the debtor, for the creditor must then fight for his debtor's cause if he is to be repaid. More common is the borrowing of an Army's services, to be paid for later. This is a debt which does not dis-empower the creditor, as the creditor has the possession of the thing lent, namely his own services. The army as service-creditor can repossess itself, as it is the loan.

Petitioner complains that even if the moneylenders do not have too much power in the United States, debt still distorts the American political process in an unjust manner. We agree in theory, but do not find that Respondent's system is as yet unjust in this respect. Debt is at the root of another kind of power as well, namely the power to motivate leaders to undertake war. Personal debt among government officials and military officers is exceedingly dangerous as it tends to render them desirous of war and foreign conquest regardless of whether such suits the national interest. They desire war because it will enrich them personally, and whereas this might be a motive in any case, it is greatly enhanced by the fact of personal indebtedness. Thucydides noted that a debt-ridden general convinced Athens to undertake its fatal invasion of Sicily during the Peloponnesian war largely in order to pay his own debts:

Alcibiades son of Clinias [was] ambitious of a command by which he hoped to reduce Sicily and Carthage, and personally to gain in wealth and reputation by means of his success. For the position he held among the citizens led him to indulge his tastes beyond what his real means could bear, and this later on had not a little to do with the ruin of the Athenian state.⁵⁰⁰

The general Nicias warned the Athenians in vain not to trust Athens' future to this debtor, saying that Alcibiades "...urges you to make the expedition, merely for ends of his own...on account of heavy expenses...Do not allow such a one to maintain his private splendor at his country's risk, but remember that such persons injure the public fortune when they squander their own..."⁵⁰¹ Nevertheless, the Athenians voted in favor of the expedition. It miscarried ruinously, however, and Athens was reduced to desperation and eventual defeat in her war with Sparta's Peloponnesian league.

Indebtedness also motivated Julius Caesar's early invasions and conquests. Roman political life in the crumbling late Republic was dominated by the need to borrow gigantic sums of money and then win bidding wars for votes. The resulting debts were then paid out of profits reaped from the offices. Lowly offices could not retire such debts, but they were the prerequisites for the prestigious high offices that could. As a result, aspiring politicians spent outrageous sums on gaining even these low offices, hoping to climb high enough to attain a truly lucrative position, such as a

⁵⁰⁰ Thucydides, *The Peloponnesian War*, Book VI, Paragraph XVI.

⁵⁰¹ Thucydides, *The Peloponnesian War*, Book VI, Paragraph XII.

provincial governorship, whereupon they could pay their debts and generate huge personal fortunes. Political factions were therefore composed of creditors willing to finance elections and debtor office-holders beholden to them. A praetorship could entitle one to a governorship of a lesser province, and a Consulship, a truly rich province. Thus, these were highly sought-after offices. Provincial governors became at once the top administrator, chief justice, and commander-in-chief of the peoples and armies within their province. There was little oversight from Rome and thus they functioned not unlike temporary monarchs and eventually tyrants. Skillful private, civic and military enterprises could produce an immense fortune, to say nothing of fame, for a successful governor. As Grant explained:

The cost of [Roman] political life was at this time prohibitive. Political costs had become more and more competitive and expensive, and the unavoidable outlays of bribery were varied and vast. The only hope of recovery was to gain office at Rome and pass from there to a provincial governorship, which even if it only lasted for a year brought gigantic opportunities of legal, quasi-legal or wholly illegal gain. The risks of prosecution were great, but they could be dealt with when the time came, if necessary by disbursing a portion of the loot...[This] necessitated the borrowing of money and the laws regulating repayment were, as in every ancient society, ruinously harsh.⁵⁰²

Into this maelstrom of debt strode Gaius Julius Caesar. He became the borrower of Crassus, and gained first the curatorship of a highway, next the superintendence of public games and buildings. His debt rose accordingly. He then staked all on a major office which he won at titanic expense, that of Head of the State Church, the so-called *Pontifex Maximus*. This lifetime office afforded substantial income from its patronage, but it was a trickle compared to his debts. Nevertheless, Caesar was then politically popular enough to win a praetorship, an important judgeship which although menial in itself, entitled its holder to an automatic appointment as a provincial governor. This was Caesar's opportunity to pay off his debts and become a power unto himself. By the time of this governorship, his debts had become so extreme that many creditors attempted to prevent his departure and were threatening his arrest. Before leaving, Caesar was compelled to borrow yet more in order to satisfy these obstructionists. Caesar's province was Spain, and no sooner did he arrive than did he launch a vast and profitable military campaign, the success of which not only entitled him to a triumphal parade in Rome, but rescued him from the teetering edge of bankruptcy. Thus, as was the case with the Athenian Alcibiades, the Roman Julius Caesar was also motivated to undertake foreign conquest partly by the phenomenon of personal indebtedness. Thus, it is clear that debt among government officials and military officers is dangerous, as it can render them desirous of war and foreign conquest regardless of whether war is in the nation's interests.

Respondent answers, however, that the role of debt is, on the whole, a positive factor in a just system, whatever the potentially troublesome side effects. We agree. The political role of debt is not limited, however, to the power of debtors over creditors, nor to the ambition which debt calls forth in leaders, but also includes the

⁵⁰² Grant, *Julius Caesar*, Chapter II.

economic impact of debt on the conduct of government and health of the overall economy. Debt often makes national defense a possibility during shortages of ready cash. Moreover, debt is a critical component of a healthy and efficient economy, which in turn affords military supremacy.

The ultimate instance of the political power of debt and the debtor is the loan of sovereignty by individuals to the state in the context of the social contract. The people are the creditors, the government the debtor, and it is the government which has the power over the people. Thus are debtors empowered as against their creditors by the phenomenon of indebtedness. Moreover, without debt, there can be no healthy economy, and hence no power and ultimately no nation at all.

For all of the above reasons it is clear that debt is a potent political force because it is property, that bankruptcy laws form harmonic constitutional counter-balances, and that debt among government officials and military officers renders them potentially desirous of war and foreign conquest. We conclude, therefore, for Respondent, as the impact of debt is, on the whole, a positive factor for justice.

THAT ANY RIGHT CAN BE DESCRIBED AS A PROPERTY RIGHT

All rights, truly speaking, are property. This results from the nature of human identity. Identity is the total of one's control, which is one's property, starting with the mind and ending with outward material things. As all rights modify or relate to this control, they are aspects of identity and thus property. When a constitution carves up power, it carves up property. All the rights it establishes are property rights when seen from this perspective.

THAT MANAGEMENT IS GOVERNMENT

We have been at pains to show how economics and politics are facets of the same subject, that each can be considered a way of looking at the other. This explains why the aristocratic element of the harmonic constitution is considered consonant with the government as against the popular element. The aristocratic and monarchic elements include all the government, which encompasses the government of business enterprises, and parenthetically, families too. Management of business enterprises is governmental, and thus economic entities are part of the political system, their labor being part of the popular element, their management being part of the aristocratic.

THAT FRANCHISING IS ECONOMIC FEDERALISM

Economics and politics are interchangeable. The same structures exist in each under different names. Such is the case with federalism, which in the business world is called a 'franchise.' Just as in federalism, every franchising operation involves a dual sovereignty between a central authority and a multitude of members; one franchisor and its many franchisees. Certain matters are determined exclusively by the franchisor, while the rest, by franchisees. Their federal constitution is called a 'master franchise agreement,' and they are usually structured as indirect federations, i.e. the

franchisor passes laws to be executed by the franchisees themselves. Franchisees exert lateral control over each other and over the franchisor by means of franchisee associations, voting rights in the master franchise agreement, and ownership of voting shares in the franchisor.

THAT THE RULE OF LAW COMPREHENDS THE VERY ESSENCE OF LIBERTY; BEING THE MEAN BETWEEN SERVITUDE AND LICENTIOUSNESS

Next, we consider Petitioner's claim that Respondent has abandoned the rule of law and resorted to the rule of man instead. As the rule of law goes to the very heart of justice, we must consider this claim carefully. First, we shall briefly review the nature and importance of the rule of law.

The rule of law means the ascendancy in a society of right over might. Since, as we have seen, right is a product of competing constitutional elements, the rule of law is the extent to which the competitive forces of the constitution bear upon the individual. The Harmonic constitution creates a balance which in turn produces laws bearing upon individuals. How strongly they bind is the 'rule of law.' If a constitution lacks competing elements, it fails to substitute right for might. The might of a single element or person supervenes and dominates. The laws thence made bear upon the people owing to the rule of this one man or class, not the rule of law generally. Thus, the absence of the rule of law is the rule of man. As Duruy explained, "[i]n states where law prevails, parties and men agitate to change the law; but where the ruler is all, it is the ruler himself whom they change. Thus riot and assassination become the law of imperial succession." Violence and bloodshed become, under the rule of man, the only mode of legislation.

Mixed constitutions have but one function, to preserve the rule of law and thwart that of men. Tocqueville remarked that "the great object of justice is to substitute the idea of right for that of violence..."⁵⁰³ The rule of law accomplishes this substitution and comprehends the very essence of liberty. It forms the crucial compromise between license and servitude, upon which virtually all of the strongest societies have been based. Though it is cloaked in the unassuming robes of judicial techné, the political import of this phenomenon cannot be overstated. It is the attribute whereby any nation, in any age, becomes a great nation. It is at once the root of power, the font of culture, and the engine of achievement. When an individual is enabled to supplant with impunity the objective force of law with his own designs, this essential aspect of national power withers and the disintegration of the society follows invariably.

The rule of law is the opposite of the rule of man, and the reason is plain when one considers the case of a tyranny. Under a tyranny, the law is indefinite; the tyrant makes and remakes whatever law he wishes, in whatsoever manner he chooses. The law is therefore in a constant state of flux, unknowable, illogical, contradictory, or unstated, as the case may be. Such haze cannot constitute the rule of law. It is the rule of whatever makes the law indeterminate, namely, the lawmakers. Hence, it is termed the rule of man, as opposed to the rule of law. When the rule of man obtains, the law is at its most indeterminate, anchored to no immutable principles, bound by neither

⁵⁰³ Tocqueville, *Democracy In America*, Part I, Chapter VIII, Section XV.

logic nor equity. In fact, one could venture to say that law *is law* only insofar as it is changeless and finite, and therefore, when it is subject to infinite vagueness, revisions, and perversions, it is not law at all. It is the rule of man.

THAT PIECEMEAL CONSTITUTIONAL CONSTRUCTION INJURES THE RULE OF LAW

The danger of descent into the rule of man is particularly great at the birth of a constitution, when the forces of law are at low tide and the barnacled vulgarities of human nature are exposed to plain view. This is the reason for fashioning new constitutions completely, all at once, from whole cloth, instead of relying on the imperfect and tumultuous gyrations of factional infighting to hammer out a constitution over the course of decades and centuries. As we noted earlier, this idea was expressed by Harrington, who concluded that “governments should be made altogether, or at once,” in order to safeguard public peace and the rule of law.⁵⁰⁴ The imperfections, vagaries and incongruities attendant to piecemeal constitutional formation kindle a permanent privation of the rule of law in a state; the shifting architectonic plates of governmental structure create crevices of lawlessness and form the natural chasms for the eruption of tyranny.

This concern was voiced in *The Federalist*, where Hamilton noted that governments instituted precipitously or upon historical accident are usually found to be greatly deficient and inadequate to their purpose. He reminded that a plan of government was far better constructed ‘in the mild season of peace, with minds unoccupied by other subjects...in cool, uninterrupted, and daily consultation; and finally, without having been awed by power or influenced by any passions except love [of one’s] country.’⁵⁰⁵ The Articles of confederation were the incomplete and hasty product of constraining circumstances; in them the rule of law could never obtain, whereas the Constitution of 1787 was a comprehensive plan, the product of cool rationality and patient debate. It is owing to the explicit rejection of ad-hoc and incremental constitution-making that the rule of law so conspicuously gleamed in the resulting United States. The danger of the rule of man was adeptly restrained at the outset.

This prudence was ignored by those who cobbled together the European Union, a hopeless edifice, comical in operation and Byzantine in form. The European Union, dating from the 1957 Treaty of Rome, epitomizes the incremental and indeterminate constitution. It is nearly a common law constitution whose boundaries are established at first by momentary agreement as to general objectives and awkwardly maintained thereafter by constant reference to evolving customs. Its constitutional methods for accomplishing critically important governing tasks, such as filling supreme court vacancies, are not written, but rather consist in the mere customs of member states.⁵⁰⁶ For example, under Article 167 of the European Community Treaty, judges are appointed simply by common accord of the member governments. No further details are established, leaving the actual procedure a matter of debate and ultimately default. Such procedures cannot later be adjudged unconstitutional, for the treaty is essentially

⁵⁰⁴ Harrington, *The Commonwealth of Oceana*, End of the Second Part of the Preliminaries.

⁵⁰⁵ Hamilton, *The Federalist on the New Constitution*, Number 2.

⁵⁰⁶ The Treaty of Rome, Article 167.

silent on them. They might be anything tomorrow. The constitution is permeated with such ententes, which shift and bend with the political winds, without any written principle of binding force. The E.C. is thus largely an *entente dynamique*. That it ever functioned at all is a singular fact; that it is a perilous and irresponsible method of political organization is beyond doubt. It is a union which, by its very structure, prevents the possibility of union. Thus, the European Community serves as an ideal example of the syndrome whereby the rule of law is dramatically and immediately endangered by piecemeal and indeterminate constitutional formation.

THAT WEAK GOVERNMENT DETERIORATES INTO PURE DEMOCRACY, SACRIFICING THE RULE OF LAW

This danger is also present in fully formed constitutions which establish governments relatively under-endowed with sovereign powers. The rule of law can only be preserved by a fully formed written constitution, embodying a strong and vigorous government, for without such a steady hand on the wheel, the ship of state is likely to be driven to its destruction by the caprice of the people or the innovations of the ambitious. Hamilton makes this point in the *Federalist*, when explaining that “the vigor of government is essential to the security of liberty.”⁵⁰⁷ The point is as critical as it is straightforward: the weaker the government, the easier it will be for people to subvert the rule of law. It is for this reason that the harmonic constitution offsets the popular power with the equal power of government.

THAT A DEFINITIVE WRITTEN DESCRIPTION OF SUBSTANTIALLY ALL ASPECTS OF GOVERNMENT ORGANIZATION IS CRITICAL TO MAINTAINING THE RULE OF LAW

The need for definitive written constitutions also deserves mention. A definitive written description of all or substantially all aspects of government organization is critical to maintaining the rule of law. Without a precise record of the constitution, it can have no very precise meaning and no fixity; and if ambiguous, it will be vulnerable to the gusts of faction, public passion and legislative ambition, not to mention the passive forces of neglect and forgetfulness. Thus, only a written constitution can resist derangement over time. Therefore, to safeguard the carefully crafted compartments and separations intrinsic to justice, they must be clearly described by definitive document and changed only through the formal amendment procedures within that document. Further, to discourage all but the most necessary amendments, such must require a super-majority vote. This is called an entrenchment provision. Such provisions guard against the tempests of public craze and political corruption which otherwise would obscure and unbalance the constitution. Needless to say, such provisions must themselves be changeable only by a super-majority, lest they lose all deterrent force.

⁵⁰⁷ Hamilton, *The Federalist on the New Constitution*, Number 1.

In addition to their indeterminacy, unwritten constitutions, or any unwritten laws for that matter, disparage the rule of law by over-empowering the individuals who expound the law, and in doing so, introduce the aristocratic rule of man. When constitutions and other laws are unwritten, the people must discover them by word of mouth, often from elders, sages, or specialists. This shifts power away from the rule of law and into the hands of those who outline and thereby necessarily interpret the laws. A definitive writing puts the law above the man; an unwritten law puts the man above the law—and not just anyone, but usually the wealthy, the learned, and the old. Hence, maintaining unwritten laws and constitutions is an aristocratic tool tending to destroy the power of the popular element. Thus, there is yet another reason for written laws and constitutions as opposed to the unwritten variety.

The final injustice of unwritten constitutions proceeds from the fact that they are essentially adjudicative in character, whereas they should be legislative. Having an unwritten constitution means that any description of government is a picture of yesterday's government, not today's. Thus, they are concerned with past matters, distinctly judicial. Legislation is concerned with matters of futurity, and as constitutional laws are the highest form of legislation, they especially should be concerned with matters of futurity, namely what tomorrow's government is required to be. Only a definitive written constitution can so bind the future. An unwritten constitution is doomed to be a memorial of the past with no power to constrain the future but that weakly supplied by precedent. In this respect it is clear that the problem with unwritten constitutions is that they are at heart judicial, not legislative as they ought to be.

THAT INDETERMINACY DESTROYS THE RULE OF LAW

In all its disguises, indeterminacy destroys the rule of law. A vague law, an unspecified commitment, a retroactive ordinance, a licentious statutory interpretation, an elastic jurisdiction, ex-post facto laws, assumed powers of all sorts; these are the offspring of indeterminacy. As such, they injure the rule of law.

In the case of an ex-post facto law, activities innocent when performed are later converted into criminal acts, with the result being that no person can be sure that any action is lawful, whatever the law says, since they may later be punished though the law be ever so clearly on their side at the moment. This makes the rule of law disappear, for the whim of the legislator is all that matters. The term 'ex-post facto law' has unwisely been restricted to criminal matters in American jurisprudence, but its brother principle, retroactivity, works the same destruction in non-criminal matters, placing new requirements and prohibitions upon past acts, rendering the lawfulness of present activities utterly unknowable. Retroactive laws are thus doubly offensive to justice, for they offend the rule of law through their indeterminacy, and as we noted earlier, they are actually adjudicative in nature and therefore cannot justly be the product of a legislative organ.

Vague laws similarly injure the rule of law. Statutory vagueness allows courts to give statutes whatever meaning and bite they desire, effectively placing burdens upon the citizens which could not possibly have been anticipated. This again renders the law indeterminate, placing all citizens in a state of legal ambiguity, unable to act with certainty, unable to respect or even understand the rule of law. The judge becomes the law, and the rule of man supervenes. Thus does the rule of law wither and evaporate in the face of vague statutes. It is replaced by the fist, the power of the state. The citi-

zens must then submit to the unfettered will of their erstwhile agents, and if there be no such power then the tyranny of the individual arises. Vague laws also accomplish an additional perversion, namely making the judiciary into a legislative entity, in violation of the separation of powers. To whatever extent a law is vague, the court stands in a position to do more than merely apply the law; it may decide the meaning wholesale. The vagueness of a law being so promiscuous, consider how terrible to humanity the vagueness of a constitution must be.

We have already noted how the vagueness of terms such as due process, equal protection, and natural rights have afforded the United States Supreme Court an unlimited degree of interpretive and amendment power, inherently destructive to the rule of law. This very danger is exacerbated by legislative preambles, acronyms, emotional dicta, conclusive rhetorical flourishes and other surplusages. These equipment invite public magistrates to substitute their own opinions for the statutes, and there the rule of law ends. In a constitution, such invitations inevitably produce an indeterminate and dysfunctional plan of government, well meaning as they may appear.

This leads to the greater truism that all interpretations risk destroying the rule of law, and all strict constructions tend to uphold it. Now this may irritate those who, in applying a law strictly, notice that it works an extreme and unanticipated hardship in certain awkward cases. Such instances beg us to ignore the strict meaning of a law and resort to the intent of the lawmaker, under the theory that the lawmaker never intended such a harsh result, and would have provided against it had he only foreseen it. This is the right course of action in the short run; in the long run it is ruinous. The court should strictly apply what it is given, evil or no, and then the legislature should amend the law if necessary, making its application clear and precise; at all costs, society should never allow the law to become overly-flexible and indeterminate. In constitutional contexts, this is even more critical, since licentious interpretations of intent and departures from strict construction can easily result in an outbreak of new agencies, departments, powers, inspectors, so many warts and bruises on the political landscape of a nation, all lacking in the coordination and specificity which alone can create a checked, balanced, and responsible government. Without extraordinary precision and care, it is impossible to design and implement a balanced federal constitution of separated powers according to a harmonic mean, and departures from strict construction tend to upset the very balances which perfect this ideal constitution.

THAT THE INTERPRETIVE RULE OF EXPRESSIO UNIUS BEST MAINTAINS THE RULE OF LAW

The rule of construction which most conduces to safety and prosperity of a society is that of *expressio unius est exclusio alterius* (the expression of one thing is an exclusion of all others, or, the affirmation of a thing negates all other things not affirmed.) For a stable constitution to exist, this principle must be ruthlessly and unceasingly observed. Under *expressio unius*, the establishment of one legislature means that *only* one legislature is to be established, and no other legislative assemblies, congresses, or parliaments are permissible. Where the appointment of judges is made the prerogative of the chief executive, *no additional method may be observed*. When the edifice of government is laid out and its powers established, *expressio unius* requires that these be respected as the only establishment and the only powers. Unless

expressio unius controls, all limits are delimited; there are no powers inherently repugnant to the constitution; there is no possibility of any act being clearly unconstitutional, since the constitution may have simply omitted mention of such questionable acts or powers. If the stated powers and limits of the constitution are not deemed to be an exhaustive and closed set, then anything may be constitutional and there is no longer any possibility of limited government. Government becomes unlimited, which means arbitrary and inherently unjust. Thus, limiting the meaning of the constitution by the principle of *expressio unius* is essential to a just society. This was observed memorably by Marshall, who noted in *Marbury v. Madison* that:

...The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed...Affirmative words are often, in their operation, negative of other objects than those affirmed, and in this case, a negative or exclusive sense must be given to them or they have no operation at all. It cannot be presumed that any clause in the constitution is intended without effect; and, therefore, such a construction is inadmissible...⁵⁰⁸

Without limits, constitutions are obviously limitless, and so is government power. Thus, the only way to impose limits on a constitution is to assume that the plan of government is limited to the distinctions drawn therein. This requires the application of *expressio unius* to constitutions at their every syllable. Now, there are many who will answer that this is too restrictive. They can be ignored as advocates of unlimited government power. But there are others who will claim this to be obvious and a waste of time to mention. They will be surprised, however, by the unashamed flight from the principle of *expressio unius* in many constitutional interpretations. Those of the European Court of Justice, in interpreting the Treaty of the European Community, are among the most shocking and absurd. In an early landmark case, the Court of Justice claimed roughly that the explicit constitutional provision for one effect of a law does not bar the possibility that such may have other un-enumerated effects.⁵⁰⁹ To give effect to unmentioned things in a constitution opens the door to unlimited interpretation and ultimately destroys the very premise of limited government and determinate constitutions. Respondent, insofar as they are guilty of rendering the laws and constitution indeterminate, are guilty of the derivative offense, outlined here, of thwarting the rule of law and replacing it with the rule of man, an inherent injustice. Respondent's creation of mixed-power agencies violates the principle of *expressio unius* and proves that Respondent is guilty of disparaging the rule of law. Accordingly, we hold for the Petitioner on this charge.

⁵⁰⁸ *Marbury v. Madison*, 1 Cranch, (5 U.S.) 137, L.Ed. 60 (1803).

⁵⁰⁹ *Van Duyn v. Home Office*, Case 41/74 [1974] ECR 1337, para. 12.

THAT INSTITUTIONAL EVASION OF RULES & ORDINANCES DESTROYS THE RULE OF LAW

Respondent begs this court to reduce the severity of our holding on the grounds that they have enacted several laws designed to safeguard the rule of law, in particular, the Ku Klux Klan Act and the doctrine of governmental immunity. We agree to do so, for the following reasons.

A fully formed society which ignores its constitution and laws, however enlightened these appear to be, has already sacrificed the rule of law. Bribery, corruption, and willful disregard of the law are only the most obvious instances of this danger. Respondent has answered this by their enactment of 42 U.S.C. §1983, also known as Title I of the Ku Klux Klan Act, Rev. Stat. §1789, which states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress...

This federal law has the effect of permitting any citizen, however lowly, to force the states and their officers to conform to the federal constitution and laws. Although §1983's coverage is not universal, as the Federal government itself is not covered, it is nevertheless admirable and somewhat mitigates the wrongdoing of Respondent in having disparaged the rule of law in the other areas illustrated above.

THAT THE DOCTRINE OF GOVERNMENTAL IMMUNITY SAFEGUARDS THE RULE OF LAW

The rule of law can also be subverted by privately suing the government actor in question. The doctrine of absolute governmental immunity seeks to eliminate this threat. It protects governmental officers who administer the rule of law from lawsuit concerning their administration. It covers chief executives, judges, prosecutors, witnesses, and other officials performing quasi-judicial functions. These officers are unique in that they form the organs which allow the rule of law to operate. Hence, their official activities are immunized from the designs and connivances of those who would fetter their activities by means of harassing litigation.

The doctrine of governmental immunity essentially protects true leadership and therein safeguards the rule of law. It accords with our own prior analysis of leadership, as well as the ancient theory posited by Plato and the modern, by Locke, that the true leader leads on behalf of the led. By this analogy, we can see how the rule of law is perfected by governmental immunity, for the statesman thereby gains the opportunity to serve the public freely, yet without license to overstep his authority.

The governmental immunity doctrine safeguards the symbiotic nature of leadership, which we summarized in *The Sophomoric Discourses*, for those who mislead, abuse or exceed their authority, mechanically destroy the relationship upon which

leadership relies, namely the self-interest of the parties. Proving that leadership must comprehend the advantage of those led is simple. Without such an advantage in the offing, leadership is impossible, for as we noted, “Men who follow others do so because they believe...that the leader to whom they defer will bring them greater rewards and benefits than they can secure by themselves or by following someone else...[and] men who lead believe that they can secure for themselves the greatest benefits in life by specifically not following others, and therefore strive to lead them instead.”⁵¹⁰ It is self-interest which motivates both leader and follower alike, and if such evaporates on either side, the leadership will cease for want of either leader or follower. Correspondingly, the doctrine of governmental immunity protects healthy leadership, for it shields the government actor only insofar as his actions coincide with the followers’ self-interests, as expressed in the institutions and policies they create. Incidentally, we note that the doctrine of *sovereign* immunity, when duly circumscribed, can serve the very same function with regard to the government itself, protecting it from political lawsuit as governmental immunity protected the officers as individuals.

The doctrine’s protections also follow Plato’s distinction between nominal and actual leaders. Plato tells us that the leader who leads only for his own advantage is not *merely a bad* leader, but rather in that respect *no leader at all*, for leadership consists exclusively in promoting the advantage of those lead.⁵¹¹ The doctrine of governmental immunity protects this strictly defined leadership, at least to the extent that the government structure coincides with the self-interest of the people.

Moreover, the doctrine protects the actions within the contours of legitimacy inherent in Locke’s theory of consent-based leadership. According to Locke, political power:

...cannot possibly be absolutely arbitrary over the lives and fortunes of the people...[T]he utmost bounds of it is limited to the public good of society⁵¹²...There is [a] way whereby governments are dissolved, and that is when the legislative, or the prince, either of them, act contrary to their trust⁵¹³...[I]t can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making...[B]y this breach of trust they forfeit the power the people had put into their hands for quite contrary ends...⁵¹⁴

⁵¹⁰ *The Sophomoric Discourses*, Book VI, Chapter XXV.

⁵¹¹ Plato, *Republic*, Book I, from 341 D. Plato begins by positing that no art is exercised for its own advantage but rather all are for the betterment of their object. Painters paint, cooks cook, physicians heal, not to improve themselves, but in order to improve the objects of their art, the materials painted, cooked or healed, respectively. By extrapolation, the art of leadership, too, is exercised not for the benefit of leadership, but for the improvement of the followers.

⁵¹² Locke, *Second Treatise of Government*, Book XI, § 135.

⁵¹³ Locke, *Second Treatise of Government*, Book XI, § 222.

⁵¹⁴ Locke, *Second Treatise of Government*, Book XI, § 223.

Governmental immunity protects the legislator only within the scope of his official duties; he is vulnerable to suit only when in derogation of the trust placed in him. His lawlessness and arbitrariness are entirely exposed to litigation, while his lawful execution of his fiduciary duty is protected. In this way, the doctrine of governmental immunity extends protection to statesmen in precise conformity not only with our own prior investigations of leadership, but also with Plato's and Locke's.

The rule of law must be upheld at all costs. It is a nation's most priceless possession, and only the physical destruction of the state should be avoided with greater exertions than the loss of the rule of law. It is the mean between servitude and licentiousness, for the laws must at once perfectly bind the people and yet be perfectly subject to their will. Respondent is therefore to be accorded some measure of leniency, for although it has debauched the rule of law in the ways enumerated above, it has wisely adopted the doctrine of governmental immunity.

THAT THE RULE OF LAW REQUIRES EVERY RIGHT TO HAVE A REMEDY

Petitioner next claims that Respondent is unjust in having enacted thousands of rights which have no actual remedy. We agree. The enormous quantity of Respondent's rights and causes of action are disproportionate to the judicial resources through which they can be enjoyed. There are too many laws and not enough courts. As a result, the rights the people enjoy on paper are illusory in reality. It is an age-old axiom that for every right there must be a remedy. In the purest sense, no right is real until a remedy exists for those who are stripped of it. This is a way to express the concept that where the scope of the law exceeds the scope of the judiciary, there is tyranny. There must always be a symmetry between the power of the laws and the power of the judges, between the reach of the laws and the reach of the courts. Any disparity in favor of either legislation or courts results in injustice, for the preponderance permits either a lawlessness in judges or a judicial impunity in legislators. Respondent has allowed such an imbalance to arise between the quantity of legal rights and the availability of the courts. Litigants are numerous because rights are numerous, but courtrooms remain few. The result is adjudication delayed beyond any usefulness. Moreover, lawyers are a near-monopoly and charge ultra-high fees for their services. This puts the full enjoyment of rights beyond the poor and even middle-class. For both reasons, thousands of rights in America exist without any actual remedy. This is an injustice, and we therefore hold for Petitioner on this claim.

**THAT OVER-LEGISLATION, REGARDLESS OF EACH LAW'S
CLARITY, CAN DESTROY THE RULE OF LAW BY
RENDERING THE WHOLE BODY OF LAW
VAGUE AND UNKNOWABLE**

Respondent alleged early in this case that the Petitioner, being a citizen of the American democracy, had consented to all of its laws and was therefore bound by them, much as Socrates claimed to be bound by the laws of Athens. Respondent reminds that Petitioner had a role in making and consenting to each and every one of its laws. Consequently, they argue, she should not be allowed to complain about the death penalty for her act of treason. When Petitioner replied that she could not have consented to a law she did not even know about, Respondent adverted to the doctrine that ignorance of the law is no excuse for disobedience, as all citizens are presumed to know the law. We know that practical considerations underlie this doctrine of implied knowledge of the laws, for without this imputation, there could be no hope of law enforcement, as each case would require the state to prove what a defendant in his own mind actually knew or did not know. Since this is a hopeless thing to prove with certainty, the principle has stood from time immemorial that the people are responsible for knowing all laws, and that ignorance thereof will excuse no infractions. We are also familiar with the implied consent which arises from one's having enjoyed the benefits of a political system, particularly a democratic system wherein each citizen is theoretically able to change a law that is disliked. We disagree, however, that these theories can be wed so neatly as the respondent would suggest. When the quantity of law becomes more than any person can reasonably learn, such implied knowledge of the law is entirely fantasy, and implied consent based upon such is, in fact, a blind consent mandated by the court. To assume a citizen's knowledge of the unknowable and then infer consent therefrom is unjust. It directly offends the rule of law, although we concede that it attempts to safeguard it. Petitioner contends that the ocean of laws governing her is unknowable, and hence most people discover laws only by being punished after breaking one. This is not law for humans, but for dogs, she insists. Dogs are taught laws by kicking them after they do wrong. Dog-law, she insists, is the unjust consequence of Respondent's over-legislation and illustrates how her consent to all Respondent's laws, and to the treason law in particular, is a practical impossibility.

We have already outlined that vagueness and indeterminacy destroy the rule of law. We must now note that vagueness and indeterminacy can be the result of perfectly clear laws if they accumulate into such appalling quantities that no citizen can ever hope to know even a fraction of them. Too many laws on the books works the same evil as do vague laws: there will remain actually no law at all. There once was an age in which any literate person could read all of the laws. Such a time is long gone, and it is impossible for even the most gifted and dedicated student to actually read every law which obtains in society. We are most decidedly sympathetic to the ancient equity doctrine that the law cannot compel an impossible act. Requiring a knowingly impossible act is to intentionally cause a failure, which renders the legislature the cause of the illegality rather than the citizen who fails. It is thus a type of

brute force, by which a helpless citizen is compelled to suffer an unavoidable penalty. This is not the rule of law but rather the rule of man.

If Petitioner could not possibly in one lifetime review all of respondent's laws, then Respondent may not pretend that she has done so and consented to all of them. We will inquire, therefore, whether Petitioner was indeed able to make this gargantuan survey of American law. To know all the law, the Petitioner would need to know the written statutes, rules, regulations, ordinances, policies, treaties, and common law of her city, county, state, the federal government and the international community. And she would also need to know the case-law of the jurisdictions relating to these levels of government.

Now, the fastest way to learn every law would be for her to read them, since such is certainly faster and obviously more reliable than seeking out experts, legislators, judges, and bureaucrats, located in various distant places, and asking them about the laws one by one. Petitioner has estimated this at roughly forty-two million pages. According to her calculations, if she read 24 hours a day without stopping from the moment she was born, she would finish when she was Seventy-nine years old, longer than the current average human life-span. Thus, she alleges such knowledge of the law as utterly impossible.

Respondent protests that her estimation is ludicrously high. They have suggested that Petitioner could read every law, rule, regulation and case in approximately fifty-six years, with plenty of time left over to lead a happy and fulfilling life. We are inclined to doubt both Petitioner's and Respondent's math, but nevertheless, we disbelieve that learning such a mountain of laws is within the reasonable reach of a normal human being. For this reason, and until Respondent makes a convincing demonstration of the actual time required for a citizen to come to know every law which bears upon him, will not allow them to impute such knowledge to Petitioner. We will, accordingly, not assume that she has consented to every law which her local, state and federal governments have enacted or decided, and we await the Respondent's detailed estimates as to this time period before making a final ruling on this matter.

We reach this conclusion in consequence of our holdings regarding the rule of law in general. Law must be determinate, and over-legislation, regardless of the clarity of each law, renders the whole overly mutable and therefore unknowable. In Madison's words:

A continual change even of good measures is inconsistent with every rule of prudence and every prospect of success...The internal effects of a mutable policy are...calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?⁵¹⁵

⁵¹⁵ Madison, *The Federalist On The New Constitution*, Number 62.

Overly mutable laws are not merely a general disparagement of the rule of law. They are also a specific adulteration of the harmonic separation of powers, as they over-empower the aristocratic element. This is because constantly changing and indeterminate laws reward those with inside knowledge of the timing and nature of such changes. Thus, the well informed Aristocrats come to dominate the people. As Madison explained:

Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation...presents a harvest to those who watch the change, and can trace its consequences...⁵¹⁶

Indeterminacy caused by over-legislating thus destroys the rule of law. But it works an additional mischief, this being to discourage all private initiative. No prudent person will undertake a business risk or commit a sum of money to some purchase, or execute any project if they suspect that the relevant law cannot be identified, or if they believe that the whim of the legislature may at any time destroy, or may indeed have already destroyed, the benefits and advantages of their undertaking. This hesitancy is linked to the excessive rotation of lawmakers as well, since this forewarns of impending statutory mutation. We suspect that the Respondent's laws are mutable and indeterminate to a degree which endangers the rule of law, particularly since they may be in their aggregation un-learnable by any human being.

THAT THE RESPONDENT UNJUSTLY REGULATED FUNERARY CEREMONIES

Petitioner complains that the Respondent's death penalty law for her brother's burial was actually an invidious discrimination against her religious beliefs, actuated by the United States' secret motive to support and extend the false religion of Christianity. We find this claim novel and controversial. We have often dealt with claims challenging the establishment of state religions, but never the establishment of a *false* religion. We agree with Respondent that the Petitioner must first prove the falsity of Christianity before we can hear such a claim.

Petitioner asserts that Christianity is false because it is a plagiarism of a previous theological system. According to Petitioner, Christianity has fraudulently stolen and re-named the tenets of a prior religion. And if that religion was true, Christianity is a falsified corruption thereof; and if that religion was false, Christianity, too, must be false. Thus, Christianity must be false in either case, as it is a plagiarism. Petitioner alleges that Christianity is simply a plagiarism of the Myth of Er and Plato's theory of the Good. The Myth of Er, as recounted in Plato's *Republic*, contains a theological system featuring an afterlife with a heaven and a hell, a judgment of souls, a stigmata of thorns, and a messenger who returns from the dead to tell about it.⁵¹⁷

Respondent counters that the myth also contains many un-Christian elements,

⁵¹⁶ Madison, *The Federalist On The New Constitution*, Number 62.

⁵¹⁷ Plato, *Republic*, at 614 B.

such as reincarnation for all, and therefore it is not fully a prototype for Christianity, and that the many similarities between the two do not entirely justify an inference of Christianity's falsity. We agree that while Petitioner may have called into serious question the derivation and originality of many Christian tenets, she has failed to prove that it is a false religion, even if it is a simplified corruption of Platonism. Petitioner must go much farther than this in order to prove the falsity of Christianity. Therefore, we will dismiss her claim regarding establishment of a false religion. We will allow her, however, to redraft her claim so as to attack not the veracity of Christianity, but rather the Respondent's establishment or impairment of religion. Funeral rites are intrinsically religious, and Respondent will not have an easy time explaining its impairment of such for political purposes.

**THAT PRESERVING THE RULE OF LAW REQUIRES
SUBJECTING TO THE LAW THE MOST POPULAR HERO AND
THE MEANEST WRETCH ALIKE, WITHOUT CONCESSION
TO PERSONAL MERIT OR ADMINISTRATIVE CONVENIENCE.**

Next, we deal with Petitioner's claim that the United States was unjust for failing to recognize her family's heroic deeds on the nation's behalf when it considered the issue of her guilt. It is well known that the Petitioner's brother and father were Presidents, and that her uncle is currently President. Moreover, one of her brothers is a national war hero. We understand Petitioner's human desire to seek a setoff against her alleged crime on account of her family's great merit and history of public service. We cannot extend Petitioner any leniency in this regard, however, for the following reasons.

When people are suffered to offset their lawless actions by their heroic deeds, they gain thereby the power to defy law with impunity and constitute a threat to liberty. The harmonic constitution and its allied principles of federalism and separation of powers stand in permanent opposition to a judicial offset for merit; under an ideal government, both the statesman and the hero are ruled by the government and brought under its laws. Thereby is ambition tempered and turned to the general public advantage. For these reasons, we regret that we cannot setoff the Petitioner's alleged wrong-doings in consideration of her family's merit, as celebrated or notorious as that merit may be.

As Machiavelli explained, "in a well ordered state, a man's merits should never extenuate his crimes." According to Machiavelli:

Well ordered republics establish punishments and rewards for their citizens, but never set off one against the other...No well ordered Republic should ever cancel the crimes of its citizens by their merits; but having established rewards for good actions and penalties for evil ones, and having rewarded a citizen for good conduct who afterwards commits a wrong, he should be chastised for that without regard to his previous merits. And a state that properly observes this principle will long enjoy its liberty, but if otherwise, it will speedily come to ruin. For if a citizen who has rendered some eminent service to the state should add to the reputation and influence which he has thereby acquired the confident audacity

of being able to commit any wrong without fear of punishment, he will in a little while become so insolent and overbearing as to put an end to all power of the law.⁵¹⁸

Thus did Machiavelli identify the threat to liberty inherent in a setoff of crime by merit. We have already identified root of this danger, however, for this kind of set-off violates the maxims of corrective justice; the trial is a corrective procedure, while the merit-based rewards given to a citizen are distributive matters, which cannot enter into a corrective proceeding but by perverting justice.

The rule of law being so critical, it must bear upon even the most popular heroes of the state. The Roman Republic almost never allowed the greatness or popularity of a citizen to entitle him to relief from legal process and the reach of courts. Laws were applied with like sobriety to the most popular hero and the meanest wretch.

The timeless story of the Horatii and Curiatii remains the most poignant reminder of this maxim. When Rome was but a village on the river Tiber, she was drawn into hostilities with her Alban neighbors.⁵¹⁹ Their armies met, but before coming to battle, the commanders recognized that a full battle would render each side too weak to resist a future attack by their mutual enemies, the Tuscans.⁵²⁰ Accordingly, they agreed to decide the issue by the combat of small representative forces. Each army happened to have a set of triplet brothers, alike in age and physical prowess, the Horatii of Rome and the Curiatii of Alba. The commanders proposed that each set of brothers should fight for his own city, and the issue of national victory or subjugation would depend entirely upon this limited six-person combat.⁵²¹ After a long description which is not worthwhile to quote, Livy explains that:

[I]n the...fight which followed...two of the Romans fell, fatally wounded...while all three of the Albans were wounded...[but still alive. The single remaining Roman] happened to have got no hurt, and though no match for his enemies together, was ready to fight them one at a time. So, to divide their attack, he fled, thinking that each of them would pursue him with what speed his wounds permitted. He had already run some little distance from the spot where they had fought, when looking back, he saw that they were following at wide intervals and that one of them had nearly overtaken him. Facing about, he ran swiftly up to this man [and slew him.] [Likewise,] before the third Curiatius could come up...Horatius dispatched the second...[U]nscathed and elated by his double victory, [he] was eager for a third encounter. [The Horatii and

⁵¹⁸ Machiavelli, *The Discourses*, Book I, Chapter XXIV.

⁵¹⁹ Livy attributes these hostilities to mutual thefts of cattle occurring around 672 B.C. Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapter XXIII.

⁵²⁰ According to Strabo, Alba was only 160 stadia, or 20 miles, south-southeast of Rome. Strabo, *The Geography of Strabo*, Book V, Chapter III, Section II. This makes Rome's geopolitical microcosm of the era 670 B.C. scarcely larger than the present Greater Los Angeles Basin.

⁵²¹ Paraphrase of Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapter XXIV-XXV.

Curiatii] were now on even terms, one soldier remaining from each side...With a downward thrust Horatius buried his sword in the [last] Alban's throat...⁵²²

The victorious Roman army returned home with Horatius in the van, displaying his triple spoils, and the Roman throngs welcomed their hero with delirious celebration. As he rode in triumph, he was met by his unwed sister, who had been betrothed to one of the slain Curiatii. She recognized on her brother's shoulders the military cloak of her beloved, which she herself had woven, and crying out, called her dead lover's name. It enraged the fiery youth to hear his sister's lamentations in the hour of his own victory and the nation's great rejoicing. And so, drawing his sword and at the same time angrily upbraiding her, he ran her through the body.⁵²³ Despite having saved the entire Roman nation, he was seized and brought before the king for trial. The king, in accordance with the law, appointed judges to pass judgment upon him for treason, as such was the charge for those taking upon themselves a function of the state, such as the punishment of individuals.⁵²⁴ He was pronounced guilty of treason and sentenced to death by flogging.

By law, Horatius was allowed an appeal, which was tried before the people. The father's testimony and entreaties moved the people, who pitied the man who stood to lose in an afternoon all three of his sons and his daughter, too. Horatius was given a lesser sentence, but the Horatii family was required to make atonement by performance of certain sacrificial rights, a burden which attached to the subsequent generations of the family. The father erected a beam across the street to represent a yoke, and Horatius was made to pass under it, with covered head. Known as the 'sister's beam,' it remained in Rome for at least six centuries.⁵²⁵

By doing this, Rome prevented the rule of law from being broken by even its greatest hero, even at the moment of his gushing victory. The rule of law was observed without any offset for the social status or fame of the individual. No height of fame or merit was suffered to afford licentiousness, insolence or impunity. The final sentence on appeal contains its own moral, for the glorious hero was symbolically put under the yoke of law, his identity concealed and rendered uniform before the bar of justice.

As Horatius' story illustrates, maintaining the rule of law requires subjecting the law to everyone, without enabling any person to change the law or suspend it by their glory, reputation, or heroic deeds. For allowing such would be to grant them a power unchecked by any constitutional constraints. This defines the rule of man, wherefore such setoffs violate the rule of law. For this reason, we refuse Petitioner any setoff for her family's services, fame and notoriety.

⁵²² Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapter XXVI.

⁵²³ Paraphrase of Livy, *Histories*, also called *Annales*, or *From The Founding Of The City* at Chapter XXVI.

⁵²⁴ See B. O. Foster's footnote to Livy, at Chapter XXVI, Line 7.

⁵²⁵ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapter XXVI.

THAT THE RULE OF LAW IS OFTEN AND EASILY DESTROYED BY TOLERATION OF MINOR LAWLESSNESS

Petitioner next argues that her infraction was a mere technicality, as she did not truly bury her brother but rather sprinkled dirt on him in the ceremonial custom of her religion. This, she argues, is a minor lawlessness, one which should be ignored in the interests of justice. We disagree with this argument for the following reasons. The rule of law is easily destroyed by a society's habituation to disobedience in small matters. When a people tolerate minor deviations from legal obedience in each other or their government, the edges and details of the laws progressively crumble, until the very center of the laws becomes just another detail and finally blows away. Minor lawlessness is all the more dangerous since it seems harmless and therefore usually goes unchecked until it has eroded a great mass. There eventually comes a threshold moment when the majority of people are actually operating outside the law, at which point those still within it cannot profitably or safely remain there. The rule of law then collapses, and its reestablishment is not only unlikely, but usually violent and revolutionary.

The potential for injustice in petty law enforcement comes from inappropriate punishment. Few complain when their small crime is reasonably punished, although their idea of reasonableness is often more generous than the innocent bystander's or the victim's. Massive anger and resentment arise only when the penalty is grossly excessive or inadequate. Unjust law enforcement arises not in the minor imbalances between the crime and punishment, but from the major imbalances. The correlation of crime and punishment is a contentious matter, but there are obvious extremes about which no reasonable person can argue. One such extremity is at issue in this case. In our opinion, the Respondent cannot be faulted for punishing a minor infraction; they are wrong only to over-punish it. We therefore reject Petitioners plea that we ignore her lawlessness due to its minor nature. Petitioner must seek redress by other arguments.

THAT THE RULE OF LAW MUST NEVER BE SUSPENDED MERELY DUE TO THE LARGE NUMBER OF CONVICTIONS WHICH MIGHT RESULT

Petitioner next argues that the Respondent's treason law ought not to be applied to her because of the large number of additional convictions it would generate. According to Petitioner, tens of thousands mourned her brother's passing, an act prohibited by the anti-burial rule under which she was sentenced to death. These mourners must be sentenced to death as well, she contends, if Respondent is to be consistent with the letter of its law, and since such would generate too many convictions, the law must be set aside. We agree that the rule is unjust, but not by virtue of its wide applicability. In fact, a court must never set aside a law merely because of the inconveniently large number of people who violate it. The adjudications and executions may be unwieldy and cumbersome, but it is never proper for the judiciary or executive to amend or vacate a law because it makes their job inconvenient or laborious. If they do this, it is not only a usurpation of legislative power, but more importantly, it immediately debauches the rule of law. As soon as the people discover

safety in mass disobedience, those who fear punishment will incite others to a like infraction in order to inflate the number of wrongdoers to the level needed to eliminate all enforcement. We therefore refuse to suspend Respondent's treason law. The large number of additional convictions it might generate does not impair the law, but rather argues in its favor; as otherwise, it would resemble a bill of attainder.

THAT THE RULE OF LAW IS MORE MILITARILY POWERFUL THAN THE RULE OF MAN

Respondent claims that abandoning the rule of law in military situations like Petitioner's is acceptable because nations periodically need enhanced military strength. In particular, Respondent asserts that the rule of man is often a necessary expedient in difficult times, when the strictures of formal government impede the nation's defensive capabilities. We disagree, since the rule of law is militarily stronger than the rule of man.

Democracies and Republics often defeat tyrannies in military contests. And although monarchies excel the other constitutions at efficiency of military command, they often lose despite their advantage, particularly over the long-term. This is partly caused by the economic inefficiency of tyranny, but it is more due to the intrinsic military weakness of the rule of man, a feature of every tyranny.

A nation mighty by reason of a conqueror is always weaker than the nation whose strength lies in its rule of law, for a conqueror succeeds only while he lives, whereas the rule of law produces an endless stream of conquerors and equips them with inexhaustible armaments. Under the rule of man, a great general may take power and lead his nation to high military achievement. No such general can make his success last long, however, unless he relinquishes the rule of man and replaces it with the rule of law. The histories of all the great captains point to this unmistakable conclusion. This is the timeless lesson of Hannibal, and it would have been the lesson of Alexander too, had he tried to conquer Rome.

In a series of brilliant campaigns, Alexander conquered most of the eastern world. Had he chosen to conquer westward, however, his career would have been far more humble, for to the west lay Rome, a nation where system and the rule of law were conspicuously strong. Alexander conquered the east because they had little system, no rule of law, just the rule of men, in which environment the rule of the greatest man always supervenes. Alexander *was* the greatest man. But as he passed away, so necessarily did his empire, which also had little system beyond the rule of man, no firm rule of law. Hence, Alexander's rule of man yielded to the rule of other men.

In his history, Livy speculates as to whether Alexander would have conquered Rome had he turned west instead of conquering the east:

...the Macedonians had only a single Alexander, who was not only exposed to many dangers but also placed himself in their way, while there would have been many Romans who could have been his match in glory...each one of whom could have lived and died as his own destiny ruled, without endangering the state.⁵²⁶

⁵²⁶ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book IX, Chapter XVIII.

Livy understood that Rome had a system that could beat a genius. Rome's existence depended on its system, not on any particular man. To beat Rome meant beating its system, and Alexander could not have easily done this. The rule of law in Rome created a pool of talented military commanders, an ocean of patriotic soldiers, and so many limitless rivers of equipment. Whether she could have fielded a true military genius or not, she could have deferred her defeat until Alexander had died, and the sons would then have been able to renew the contest on more equal terms, the Romans profiting from the military lessons of Alexander, the Macedonians humbled by the loss of an irreplaceable genius. Moreover, Carthage may have allied with Rome, doubling Alexander's problems.

With Alexander, all this is speculation. But it was the real fate of Hannibal, a military genius whose failed invasion of Rome provides the definitive proof of the superiority of system over celebrity. A more brilliant general perhaps never walked the Earth, but he was unable to break the Roman system despite his unparalleled string of military victories. Hannibal destroyed three Roman armies one after another at Trebbia, Trasimene, and Cannae, but he discovered that even multiple catastrophes could not defeat Rome, much less could a single battle, nor could the death of any particular Roman general. Hannibal remained defiant and largely undefeated for the next nine years, terrorizing southern Italy at will while eventually outnumbered nearly five-to-one. Skillful Roman generals rose to prominence, died, and were replaced by new ones. Defeated Roman armies were reconstituted time and again. In the end, there was only one Hannibal against the hydra-like power of Rome.

More astonishingly, Hannibal discovered that Rome's allies remained obstinately loyal. Hannibal's grand-strategy was to weaken Rome by detaching its allies and breaking up its federation in the boot of Italy. Such diminution would leave his own Carthaginians masters of the Mediterranean basin. Thus, the war was principally over the loyalty of allies. But Rome had cemented its federation with a rule of law exceeding anything Hannibal could offer in exchange. Hannibal had no rule of law to offer them, only a freedom from Rome and a probable subjugation to Carthage, a state which treated its own tributaries harshly.

Rome's allies remained basically loyal out of self-interest, for they not only feared Roman vengeance more than Hannibal, but they very often desired to live through Roman protection, with Roman trade, and under Roman law, even though not fully citizens of Rome. For example, when the wealthy city of Capua was threatened by the Samnites, it sent ambassadors to Rome begging to be allied with or incorporated into the Roman state, claiming:

We have reached the point, [Senators,] when Campania will have to be absorbed by her friends or her enemies. If you defend us, we shall belong to you; if you abandon us, to the Samnites...No colony of yours shall there be which will surpass us in obedience and loyalty towards you...⁵²⁷

⁵²⁷ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book VIII, Chapter XXX.

The Romans, being already allied with the Samnites, judged that they could not violate this prior friendship by allying with a Samnite enemy, and so informed the distraught Capuans. The Capuan ambassadors then stunned the Romans, saying:

Since you refuse to take justly violent action to protect what is ours against violence and injustice, at least defend what is your own. To your authority, [Roman Senators], and that of the Roman People, we therefore submit the people of Campania, the city of Capua, our territory, the shrines of the gods and everything else, both sacred and profane. Henceforth, whatever we suffer, it will be as subjects of yours after surrender.⁵²⁸

Thus the City and its territory by voluntary submission came into the possession of Rome. The Capuans chose the Roman over the Samnite yoke, judging that the former was the better. Eight years later, the policy of how to treat faithless allies was debated by the Roman Senate. The Consul Camillus, fresh from quashing the rebellion of all Rome's allies in Latium, spoke as follows:

[Senators,] the task we had to perform in Latium by armed warfare has now reached conclusion by favor of the gods and the bravery of our soldiers. The enemy's armies were cut to pieces at Pedum and on the Asura: all the Latin towns and Antium in Volscian territory have either been taken by storm or offered surrender, and are now held by our garrisons. It remains to consider, since the Latins harass us so often by renewing hostilities, how we can keep them quiet and continuously at peace. The immortal gods have put you in control of the situation, so that the decision whether Latium shall exist in [the] future or not is left in your hands; as far as the Latins are concerned, therefore, you have the power to create a permanent peace for yourselves by exercising either cruelty or forgiveness.

Do you choose to adopt harsh measures against men who have surrendered and suffered defeat? You may destroy the whole of Latium, and create vast deserts out of the places from where you have often drawn a splendid allied army to make use of in many a major war. Or do you want to follow the example of your ancestors and extend the State of Rome by admitting your defeated enemies as citizens? The material for such an increase is there in abundance, with glory to be won of supreme kind. Certainly by far the strongest government is one to which men are happy to be subject...It was our duty [as soldiers] to give you [the Senate] the power to make decisions about everything; it is yours to decide what is best for yourselves and for the State.⁵²⁹

⁵²⁸ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book VIII, Chapter XXX.

⁵²⁹ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book VIII, Chapter XIV.

Accordingly, Roman citizenship was extended to almost all of mid-western Italy. Not long afterwards, Capua requested that Rome give it not only Roman laws, but also Roman prefects, a request which Rome wisely granted. No sooner was this done than an avalanche of such requests fell upon Rome, for the news had spread throughout the allies that Roman laws and discipline had solved the Capuans' internal difficulties. It was after this that, in Livy's words, "the power not only of Roman arms, but of Roman law began to be widely felt."⁵³⁰ As these stories illustrate, Roman allies had learned the advantages of Roman rule of law as well as the disadvantages of challenging it. Accordingly, when Hannibal invited them to abandon their Roman alliance, few accepted the invitation.

Carthage's ill-treatment of its own allies served further to discourage defection from Rome. Carthage preserved its subject alliances by threat and treated them harshly; there were no positive advantages to an alliance with Carthage. As Polybius relates:

The Carthaginians had ever been accustomed to depend for their private supplies on the produce of the country, their public expenses for armaments and commissariat had been met by the revenue they derived from Libya...During the [first Punic war against Rome], they had thought themselves reasonably justified in making their government of the Libyans very harsh. They had exacted from the peasantry, without exception, half of their crops, and had doubled the taxation of the townsmen without allowing exemption from any tax or even a partial abatement to the poor. They had applauded and honored not those governors who treated the people with gentleness and humanity, but those who procured for Carthage the largest amount of supplies and stores and used the country people most harshly...The consequence was that the male population required no incitement to revolt—A mere messenger was sufficient—while the women...stripping themselves of their jewels contributed them ungrudgingly to the [revolutionary] war fund.⁵³¹

Carthage's federative system was really just an extension of the rule of man to outlying areas, a kind of imperialism rather than federation. When Roman allies considered leaving the Roman rule of law for such harsh new masters, they were naturally reluctant, as Hannibal discovered. Few of Rome's allies were so disgusted with Roman subjection and Roman law that they were willing to exchange it for a Carthaginian rule of man, especially at the risk of Roman military retaliation. As a result, Hannibal was unable to break up the Roman system of alliances in Italy; his military genius being impotent against the Roman system.

Those allies who abandoned Rome and sided with Hannibal made the tragic mistake of joining the rule of man against the rule of Law. Capua, for all her promises of loyalty to Rome, at length made this fatal error and was ultimately destroyed by it. Capua chose to confide its safety to the rule of man, a great man, and joined Hannibal after Rome's fourth defeat in a row, at Cannae. But Capua was endangered whenever

⁵³⁰ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book IX, Chapter XX.

⁵³¹ Polybius, *Histories*, Book I, Chapter VXXI.

Hannibal was absent; by contrast, the Roman system and its resources were ever-present. It was only a matter of time before Hannibal would be detained elsewhere and Capua retaken by Rome. The fall of Capua was the inevitable fate of a city that put its faith in man over system. It is an interesting postscript to note that even after joining Hannibal, however, Capua refused to allow Carthage to change its Roman laws.

Thus, we reject the Respondent's claim that the rule of man is more militarily powerful than the rule of law. The story of Rome dramatically illustrates the decisive advantage of a great political system over a great individual, however gifted.

THAT IDEAL SYSTEMS ON PAPER CAN STILL BE DOMINATED BY THE RULE OF MAN.

Respondent argues that we are wrong to say that the better system always wins. The Achaean Federation, they argue, was far superior to the Roman Federal system, and yet the Romans had no trouble destroying it. We agree that the Achaean system was in principle better organized and more pure than the Roman Federation. We disagree, however, that it was better *in actuality*, since it never truly emerged from the rule of a single man, namely Aratos, whose military skills were so miserably lacking that the entire federal project ultimately failed. Truth be told, the Achaean Federation, for all its formal perfection, never rose above the rule of man and hence never attained the actual strength which its federal form warranted. In design it was beautiful. But the problem was that one man raised it, ran it, and then ruined it.

The Achaean League was the best and finest political structure to come out of classical times. It was Greece's greatest achievement in government, and it would certainly have resisted Roman conquest had it not been almost single-handedly created, governed and squandered away by a single individual, the enigmatic Aratos. The league was formed around ten rather insignificant towns in the northern Peloponnese. They played no major role in the Peloponnesian war, and were considered a backwater by the more famous city-states like Corinth, Sparta, Athens, Thebes and Pella. But in their obscurity they had the leisure and wisdom to create a remarkable federal government, in which each city was represented equally in a federal council, which in turn voted on policies and elected a federal leader, called the Strategos, who commanded the Federal Army and acted as chief executive of the league. The league also had a senate and other minor officials, but the gleaming beauty of the arrangement was that no member state served as the federal government—the central government was a new creation by the enthusiastic members, and it had authority in some matters to bind directly the peoples of the member states—a true and pure federation. Moreover, each member had an identical say in the federal council, one vote each. This differs drastically from the Athens' Delian league, wherein Athens itself was the central government, and after negating the votes of the other members, took to passing edicts binding not on the federal citizens, but on the member states severally, for their further implementation on pain of war.

Aratos appeared on the scene at this time, and by encouraging popular revolts against tyrants, brought into the league the huge cities of Sikyon, Corinth, Argos, Megalopolis, Megara, and the Island of Aigina, each with the same single federal vote the original members each possessed. Never before had so many Greek communities

been united under a federal umbrella of strict equality. No doubt, Aratos' acquisitions on the league's behalf catapulted him into near god-like status among the Achaeans. From the age of twenty-six, he was elected Strategos of the League seventeen times, every second year until he died, being constitutionally ineligible to hold the office for consecutive terms. The League became the first, best, and last hope of true Greek liberty and orderly government. It gained immense power and moral influence by virtue of its equal representative system and many states joined it rather than suffer from Macedonian oppression.

But Aratos, the man that had brought the League so much power, became corrupted by his godlike status and began to run the League as his personal enterprise. When the Spartan King Cleomenes attempted to restore Spartan power, Aratos could not tolerate the personal affront of another hero directing a rival state, nor could he suffer Sparta to exist on the same Peninsula as his beautiful Achaean League. War was declared, and Sparta, led by Cleomenes, beat Aratos again and again and again. Never in the history of warfare has a general been so uniformly inept as Aratos, who seemed congenitally unable win a battle of any size unless his enemy were quite literally asleep in their beds. His constant failures doomed the League; it was soon faced with the grim reality of surrender to Sparta. Instead of suffering this deserved humiliation, Aratos perverted the League. He offered to give one of the member states to Macedon in exchange for Macedonian aid against Sparta. Corinth, the gate of the Peloponnesus, was to be the victim of the trade. This attempted betrayal of a federal member caused the implosion of the league, as members no longer could confide their safety in Achaean Federal hands. The Macedonians came, seized Corinth, defeated Sparta, and assisted Aratos in the chore of forcing the departed members back into the Achaean league, at the point of Macedonian spears. It was now a perverted federation run by a man whose personal power swamped the constitution. The dream of Grecian freedom under a great federal republic was dead. Moreover, with the Macedonians ascendant, the league had lost even the power to direct its own affairs, having become in effect a Macedonian satellite. Its arms were exhausted, its credibility was ruined, its autonomy sacrificed. A generation later, when the Romans became serious about defeating Macedonia and subjugating Greece, the Achaean league could do little more than delay the process for a decade or two.

Thus, we do not believe that the best system lost. The best design was not brought to fruition; it was dominated by a single man, political genius, military idiot. The Roman federation, while less pure, and far less equal, was a system relatively unpolluted by the rule of man. Its Republican constitution was at the height of purity and balance. It had endured and defeated Hannibal, maintained its alliances, and learned the art of war in the bloody crucible of the Punic conflicts. It had a list of talented commanders and could field over 300,000 legionaries if need arose. The only real question is how the Achaean League could ever have hoped to defeat Rome.

The answer is obvious to this court, but it is something perhaps impossible. The Achaeans lacked only a talented military commander and competitive rotation of chief executives. Aratos needed to send for the one man on Earth who could achieve victory for Achaean arms against all comers. Since the end of the Second Punic War, Hannibal had spent his years banished in the court of Seleucis, wasting his precious talent. Achaea needed to put Hannibal in command of the Achaean armies. Sparta, then Macedon, then Asia Minor, Phoenicia and even Egypt could have been conquered in short order, and possibly enrolled as equal League members. Perhaps even Car-

thage could have been retaken and enrolled. And having enlisted Hannibal, Aratos needed to step down and allow other talents to become chief-executive of the league. Then there would have been the rule of law, safeguarded and expanded by irresistible military might. Would Hannibal have done it? Perhaps. Would Aratos? Never. He was not General Washington. And this is why there was no system in Achaia, and why we hold that the Roman federation was, although inferior in design, in fact the better of the two federations. In Rome, the rule of law supervened. In Achaea, it could have, but did not.

THAT WHEN THE RULE OF MAN SUPERVENES, SUCCESS THEREIN IS THE ONLY WAY BACK TO THE RULE OF LAW

Respondent next defends its actions against Petitioner on the theory that corrupt acts are necessary when corruption reigns generally, as it currently does in the international arena. We agree with the principle but not the point of application. When universal, corruption can be banished only by corruption of a more clever and far-sighted nature. However, the international arena is not currently so corrupt as to warrant the application of this rule to Respondent's conduct towards Petitioner.

When the rule of law has disappeared, it can be restored only by succeeding within the ugliness and violence of the rule of man. Only by using such methods can one dominate the political landscape and re-impose the rule of law. In other words, when corruption replaces legality, only by adroit corruption can legality be restored. This restoration is arduous, as we have already noted. But strict adherence to legalities in the atmosphere of universal corruption virtually guarantees practical failure. True, there is some moral victory to be claimed on the individual level, and some hope in the potential of martyrdom to effect the desired change, but these are usually irrelevant the restoration of legality. Under such circumstances, perfect obedience to legality is the equivalent of capitulation to lawlessness.

This principle is illustrated by the career of Cato, a hero to those who champion the rule of law as against that of man.⁵³² Cato was a champion of Roman constitutionality during the dying days of the Republic, and his career became a crusade against the competing tyrannical designs of Gaius Julius Caesar, Pompey the Great, Crassus, and Marcellus Scipio. His method was to practice impeccable lawfulness and thereby oppose every syllable and stroke of those aiming at the personal domination of Rome. His efforts ended in failure and suicide, though his legacy had some positive effect on other Republics. In fact, not only did his methods fail, they drastically accelerated the phenomena he sought to combat.

Cato detested Caesar, certain that the latter had somehow participated in Cataline's conspiracy to overthrow the Roman government in 62 BC.⁵³³ He therefore resolved to stymie and marginalize Caesar with all lawful means available. Now, when Caesar returned victorious from his governorship of Spain in 59 BC, he was not necessarily predetermined to ruin the Roman Republic and dominate it as he eventu-

⁵³² Marcus Porcius Cato Uticensis, alias Cato the Younger or Cato of Utica, 95 B.C.—46 B.C., great-grandson of Cato the Elder.

⁵³³ For this entire section, see generally, Grant, *Julius Caesar*, Chapter II.

ally did. After all, he was a blue-blooded patrician following the formula of countless generations of Roman politician/commanders: attain office, gain command, achieve victory, return to a triumphal parade and seek higher office. This was a constitutional and traditional trajectory, and it could be argued that Caesar was in no way deviating from constitutional practices.

Caesar was duly voted a Triumph for his Spanish conquests, and he was eager to stand for the Consulship, since he was to turn 41 that year, the first year a Roman was legally entitled to run for Consul. It was an especial honor for a Roman to be elected to the Consulship in his first year of eligibility, for it gave the impression that the entire state had been eagerly awaiting his availability. Caesar was set to capture both honors, the Triumph and election to the Consulate in 'his year'. In this instance, however, Cato detected an illegal technicality in Caesar's design to hold a triumph and stand for the Consulship at the same time. A triumph could not be held for a commander after he had already returned to the city. After all, it would be a mockery to 'welcome home' a victorious general who had already come home. But the deadline for Consular candidacy required Caesar to personally be in Rome before the elaborate Triumph could possibly be arranged. Hence, Caesar sought a Senatorial decree allowing him to stand for Consul *in absentia*, thus allowing him both to have the Triumph and run for Consul in his year. Consuls had run *in absentia* before. Cato, however, using legal parliamentary tactics, managed to kill the request by consuming the entire final day of the Senate session with a long speech on unrelated topics. Caesar was humiliatingly forced to abandon his Triumph, though he won election as Consul in his year.

Having legally destroyed Caesar's Triumph, Cato then sought legally to destroy Caesar's Consulship as well. To this end, he elevated a political foe of Caesar's to the other Consulship that year, this being Bibulus, a move that would cast all of Caesar's measures into legal doubt, as Bibulus intentionally destroyed them by declaring that he was not finished watching for omens, an ancient but real constitutional prerequisite to any consular action. Thus by saddling Caesar with a colleague who suspended the legitimacy of all his official acts by refusing to finish omen-watching, Cato was able legally to destroy not only Caesar's Triumph, but the legality of his Consular acts, too. This exposed Caesar for life to potential lawsuit, imprisonment, and exile for the acts of his Consulship if ever out of public office and thus without the immunity it carried.

To finalize the humbling of Caesar, Cato also arranged for the Senate to predetermine that the Consuls of Caesar's year should be allotted relatively worthless governorships upon their retirement, thus making Caesar's complete ruin inevitable as he slipped into political insolvency and was crushed by his debt. At that time, Roman political offices were won by enormous bribery competitions. This created huge indebtedness among elected officials. The only way to pay these debts and become a creditor was to gain higher office, like a Consulship, and enjoy the traditional assignment of a Governorship upon retirement from office. In this manner, successful officials could build their own factions of indebted underlings. Cato knew as well as Caesar that only a lucrative provincial governorship would rescue Caesar from his vast political debts and permit him to become a true power-broker in his own right. To prevent this, Cato had the Senate legally assign trifling local provinces, 'forests and cattle runs' as the Consuls' governorships, instead of the gigantically profitable

posts like Spain, Illyricum, Greece, Cisalpine and Narbonnese Gaul. In this way, Cato destroyed the utility of Caesar's being Consul and seemingly doomed his career, all by the letter of the law.

In another era this may have worked. But by Cato's time, Marius, Sulla, and the murderers of the Gracchi had already destroyed the Republic, which remained a corrupt and violent shadow of its former self. As it was, Cato's pristinely legal annihilation of Caesar's plans in this critical year had disastrous consequences. Not only did it fail to curb Caesar's power, it catapulted him into superpower status, since it constrained him to form the first triumverate. It forced Caesar into an alliance with Pompey and Crassus, each disaffected with the Senate and orderly government in general for his own reasons. This alliance, the 'Triumverate', united resources which instantly overwhelmed the residual political machinery of Rome and left matters in the lap of the Triumvirs to determine as a clique. Once in office, Caesar reacted with all the viciousness that his political genius could muster, violating the sacro-sanctity of the Tribunes, intimidating the Senate with armed soldiers, drowning the people in lavish gifts of land, and finally repealing the governorship assignments and giving himself three rich provinces upon retirement, Illyricum, Cisalpine, and Narbonnese Gaul, for not one, but an unheard-of *five years*. He was able to do this with near impunity through the power of the Triumvirate, for Pompey commanded the loyalty of the Army and Crassus had near-limitless funds. Moreover, Caesar had Cato temporarily jailed, and then had the corrupt Tribune Clodius ship Cato off to Cyprus on a distant diplomatic mission, where he would be long out of the way. Cato obeyed the law shipping him to Cyprus since it was passed constitutionally. This was a grievous mistake, for he absented himself from the Capitol at a time when Caesar and Pompey's power could yet have been checked and the Republic saved. In refusing, he would have been acting illegally, but he would have been in derogation of a law proposed by a Tribune who bribed his way into office and was a conspirator against the laws of the Republic. Such an act would be corrupt, but would have been necessary to check the general corruption of the times. Punctilious fidelity to the duly made laws of corrupt officials took Cato from the scene and actually kept him from countering the corruption of Caesar, Crassus and Pompey in the year following Caesar's Consulship, before Caesar's fabulous conquest of Gaul rendered him nearly invincible.

Worse for the cause of the rule of law was Cato's failure to gain election as Consul, a post from which he would have had the legal authority and military resources with which to humble and disarm Crassus, Pompey and possibly even Caesar. He lost the election due to his scrupulous observance of generally disregarded campaign laws. He could have committed this corruption with impunity and gained the only power which could have realistically checked the overall corruption in Rome. He would have had his own governorship afterwards, his own armies, and a war-chest of funds with which to restore the Republic. Instead, Rome was forced grudgingly to offer Pompey a sole Consulship to stem the general anarchy of the state and repel the invasion of Caesar at the outset of the Civil War. Had Cato attained Consular rank, there is reason to suppose that Pompey would never have been nominated to that command, and the civil war may have not occurred or been of a different outcome. Granted, Cato would have had an uphill battle against Caesar, but he would have fought more energetically than did Pompey, and he would have been less vulnerable to the Senatorial pressures which finally clouded Pompey's military judgment. As it was, Cato's fidelity to the rule of law made its extinction nearly inevitable.

Finally, near the end of the Civil War, when Caesar stood triumphant in Egypt with Queen Cleopatra, the desperate remnants of Pompey's army turned to Cato for leadership. This Cato refused on a legal technicality: he had never attained a public office entitling him to any such command. This was absurdity. The state was headlong into a revolution already nearly lost for the Republicans, the actual laws of the Republic were long in abeyance, and Caesar was by then the sole power in Rome. Cato's assumption of command was the only hope the Republic had left, as the other potential commanders were either would-be tyrants themselves, like Metellus Scipio, or incompetents, even by Cato's own estimation. Instead of engaging in this necessary breach of the rule of law, Cato committed suicide. By his exaggerated obedience to legal technicality, he threw away the larger objective of preserving the Republic and reinstating the rule of law. Cato's career makes it clear that when the rule of man supervenes, the rule of law can only be restored through excellence within the rule of man. Cato refused to dirty himself in the rule of man, and as a result, permitted it to prevail.

On the contrary, the career of Lucius Junius Brutus shows that restoring the rule of law, when corruption has otherwise become general, requires a correct deviation from lawfulness. Corruption in Rome was somewhat limited during the early days of the city, it being a more or less orderly elective Monarchy with an advisory Senate. Though Romulus was anonymously assassinated, his successor, King Numa, was elected during an interregnum without violence or corruption by the consent of the Roman people. Upon his death, also by anonymous assassination, another peaceful interregnum elected King Tullus, and a third after his demise elevated Ancus to the throne. A fourth, no less peaceful, elected Tarquinius Priscus to the throne at Ancus' death. During these times the transfer and exercise of political power was basically within the bounds of the unwritten constitution. The kings were elected without memorable fraud or corruption, and they held an absolute power during their lives which none abused to the degree of being remembered a tyrant. However, this system began to fall into corruption when Servius Tullius gained the Kingship. He simply grabbed power when Tarquinius Priscus was assassinated by his predecessor's children, who hoped to elevate themselves to the throne instead of allowing Priscus to complete his grooming of Servius for the succession. Servius seized power of his own accord when he discovered the assassination, dispensing with the constitutional election procedure.

Such began the corruption of Roman Kingship, during the reign of its sixth king. The corruption surpassed all bounds, however, with the seventh king, Lucius Tarquinius the Proud. Servius' daughter was a viciously ambitious woman who by murder married the equally cold-blooded son of former King Tarquinius Priscus. She instigated him to eject her father, King Servius, on the pretext of his lack of elective origin, and rule in his place, reclaiming the throne in the name of the Tarquin family. Lucius Tarquinius did this, while his wife arranged the murder her father, King Servius, as he fled home up the Esquiline hill. Tarquinius and his wife then rode together up the same hill, running over the corps of her dead father as they ascended. With Tarquinius, what rule of law there was in Rome came to an abrupt end.⁵³⁴

The people had not elected Tarquinius, nor had the Senate confirmed his acces-

⁵³⁴ Livy, *Histories*, also called *Annales*, or *From The Founding Of The City*, Book I, Chapter IX.

sion. He began the novel practice of trying and executing his enemies and those from whom he simply wished to seize money. He also abrogated the tradition of consulting the Senate on governing matters, ruling entirely without their input. His tyranny outraged and intimidated the Roman people to such a degree that for half a millennium thereafter the Roman people still abhorred the title 'King.'

Brutus was born into this corruption. But by masterful strategy, admitting of clever but not excessive corruption, he defeated corruption generally and reestablished the rule of law in Rome. As Tarquinius had murdered Brutus' brother, Brutus pretended to be retarded, thus shielding himself from Tarquinius' suspicions. In the meantime, he awaited an opportunity to get rid of Tarquinius. This presented itself when Tarquinius' delinquent son Sextus raped the noblewoman Lucretia. She committed suicide from shame, and her husband, father, and Brutus vowed to avenge her death by destroying Tarquinius. Brutus roused the people of a neighboring village to rebellion, clearly an illegal act, and marched them to Rome, where they merged with a like mob, incited to the pitch of anger by the news of the rape of Lucretia and their long years of suffering under Tarquinius. Brutus then led the great mass of revolutionaries to a neighboring city under siege by the Roman army, led by Tarquinius. Before they arrived, however, Tarquinius heard of the uprising and headed for Rome. Brutus found a leaderless army which hailed him as the liberator of Rome. Tarquinius found the gates of Rome locked against him and was forced into exile.

A new constitution was instituted, and two annually elected consuls were substituted for the office of King. Brutus also restored the power and dignity of the senate, which had been depleted and cowed by Tarquinius' political murders. Thus, Brutus was able to restore the rule of law after seizing the opportunity to do so by skillful exercise of the rule of man. Brutus' acts were unconstitutional and in illegal, but they were just, and they were what the times required. To emphasize the reinstatement of the rule of law, Brutus even stood by and presided over the execution of his own sons after they were convicted in a plot to restore Tarquinius to power, as the law required. He made no attempt to use his personal power to alter the rule of law. He thus used the rule of man when it was necessary to restore the rule of law, but refused to resort to the rule of man when that of law crossed his interests.

Thus it is clear that when corruption reigns, only more skillful corruption can rekindle the rule of law, and strict obedience to the rule of law during such times only results in failure. We note parenthetically that this is the actual meaning of Machiavelli's statement that reforming a corrupt state requires first the establishment of a monarchy. Thus, while we agree with Respondent that corrupt times demand corrupt acts in order to overcome corruption, we do not hold that Respondent's political circumstances are so corrupt as to warrant application of this principle.

THAT PLATO'S THEORY OF TRUE LEADERSHIP GOES TOO FAR, RESULTING IN THE PARADOX OF LEADERLESS GOVERNMENT.

Respondent now tries to excuse its attitude towards, and treatment of, Petitioner by arguing that a certain degree of selfishness in leadership is natural and unavoidable, a fact for which they should not be penalized. We agree with Respondent's premise, but disagree with the conclusion they draw there from. We have already recounted Plato's theory of selfless leadership, but we have also noted the incurably self-interested nature of not only mankind, but also political leadership and partisanship. There is a conflict between these theories. If we are to be consistent with our description of mankind's inherent selfishness, Plato's theory of true leadership goes too far, since the complete absence of personal benefit to leaders would induce everyone to become followers, and society would be in actuality leaderless. This gives rise to a paradox of leaderless government.

Many will claim that Plato's definition of leadership is naïve. Certainly, they will say, leaders everywhere secretly pursue their self interests and little else. In fact, they will even cite the theory of separated powers and checks and balances in support of their claim. Indeed, the very best constitutions and institutions are based on the assumption that all leadership is essentially self-interested. Plato's definition of leadership is naïve, ideal, incongruent with the frailties of human conduct. Disturbingly, this is not a defect in his definition of leadership, but rather a defect in the character of humanity. If both Plato's propositions and our own observations of human conduct are correct, namely, that leadership by definition excludes self-interested action, and that human beings are hopelessly bound to pursue their self-interest, then we will be forced to confess that there can be no human leaders, and that the very idea of government by separated powers and checks and balances assumes a leaderless government in the strictest sense, government exclusively by selfish direction. Thus, Plato's theory paradoxically establishes leaderless leadership.

The paradox of leaderless government is particularly acute in the case of the United States, for its constitution was established explicitly on the premise that selfless political behavior, the hallmark of leadership according to Plato, is non-existent, a pipe dream perhaps to be wished for but not to be sincerely expected. Human beings are irrevocably and perpetually involved in selfish contests; the selfless leader is the fabulous creature of utopia, not a denizen of this Earth. In *The Federalist*, Hamilton summarizes this candid assessment of human nature by stating that human beings "are ambitious, vindictive, and rapacious"; that to presume otherwise, "would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages," and that among the chief causes of political unrest are "...private passions...the love of power...the desire of pre-eminence or dominion, the jealousy of power, [and] the desire of equality and safety."⁵³⁵ Clearly, history is replete with examples of leaders who, "assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquillity to personal advantages and personal gratification." In a final dismissal of expectations regarding selfless leadership, Hamilton asks:

⁵³⁵ Hamilton, *The Federalist On The New Constitution*, Number 6.

Has it not...invariably been found that momentary passions, and immediate interests have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice?...Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities? Is it not well known that their determinations are often governed by a few individuals in whom they place confidence, and are, of course, liable to be tinctured by the passions and views of those individuals?⁵³⁶

The critics of Plato's formulation of leadership, with Hamilton among their number, will point out that mankind has had enough of the tragic, deluded and extravagant theories which promise miraculous suspensions of humanity's demonstrated weaknesses. They will urge that we banish deceitful dreams of a golden age filled with golden leaders, dreams which invariably produce nightmares in reality.

Plato's proposition that leaders, insofar as they are leaders, always enact the public good and never consult private advantage, forces us to concede that the United States is designed to operate without any leaders in the Platonic sense, that pristine Platonic leaders are impossibilities. Thus, Plato's theory results in a paradox of leaderless government when applied to actual nations and cannot be relied upon as a practical definition of leadership. Much better are the theories of Locke and those of our prior investigation in the *Sophomoric Discourses*, to which we adverted earlier. Nevertheless, if we permitted Respondent to set up this paradox as an excuse for its lawlessness or injustice, there would be no limit to the perversions of leadership which would follow. For this reason the paradox, while of intellectual interest, has no legal utility for Respondent.

THAT ECONOMIC HEALTH DOES NOT INVARIABLY INDICATE A JUST SOCIETY.

Respondent next argues that despite all its alleged injustices thus far, its economy is booming and the people are rich; therefore American society must be just and Petitioner has no basis to complain. Because this suggestion is particularly alarming, we will discuss it in detail. Economic strength, as we have seen, derives from and reinforces the stability of the nation. Moreover, it is ultimately a product of the state's constitutional format. Smith demonstrated the overwhelming efficiency of capitalism in creating the wealth of nations. Trenchard and Gordon underscored the incompatibility of capitalism and despotism. Marx, Veblen, Keynes, and Friedman demonstrated the flaws of capitalism and wrought solutions answering thereto. The resulting economic theory contains safeguards against the centripetal tendencies of capital sufficient to allow stable economic prosperity over the long term. This a principle goal of responsible constitutional construction, as we have also seen. Nevertheless, boom times can conceal the growth of tyranny, and economic success often works to impede reform.

⁵³⁶ Hamilton, *The Federalist On The New Constitution*, Number 6.

Many erroneously believe that contemporary economic health indicates a just society. This is the fallacy of asserting the consequent.⁵³⁷ We must note that economic health can prevail over the short term, for several generations, from a number of different causes including military success and geopolitical fluke. Spain's Sixteenth-century economic success was the product of military conquest and the killing and enslavement of subject peoples; Saudi Arabia's in the Twentieth century, from serendipitous location upon underground crude oil deposits. Their short-term economic success did not prove that they established just societies. On the contrary, their economic power helped perpetuate tyrannical political systems. Economic success can help prolong an unjust status-quo, but not indefinitely. Only in a just society will the economic system naturally augment itself generation after generation. A just society must be politically stable, which requires a mixed constitution, separations of powers, checks and balances, and competitive capitalism. Only in such a nation will long-term stability and safety allow the individual maximum liberty and the market maximum wealth.

This period of stability, to be material, must exceed the lifetime of the individual citizen and extend beyond those of their grand-children. The short-term stability of an enlightened despotism or Oligarchy produces laudatory effects. But this power fails in the long run. This accords with what we observed earlier regarding the pure constitutions, for Kingship and Aristocracy have on occasion been superior to even mixed constitutions during brief periods of ideal leadership. Such periods are rare and usually followed by political tragedy. The prosperous times are certainly thought to be good by those enjoying an enlightened despotism. It is their children who generally reap the poisoned fruits of this short lived success, that is, if they live to do so. In pure constitutions, the constitutional cascade destroys the lives and property of untold future generations. Therefore, we must not view economic success as strictly evidentiary of a just society; we should merely note that it best results from such, but may also be the temporary result of a deeply flawed system.

It is incumbent to make note of this principal since many nations have risen to a brief economic prominence within a generation, and they never fail to announce that they have attained a perfect system of government. Worse, states whose success has been momentarily eclipsed often agree. Thus have a heap of soiled despotisms and oligarchies been esteemed among the best governments on earth by those whose economic plight obscured their better judgment. This is now the case of Singapore, Brunei, and the Arab Kingdoms in the Middle-East. This was the case with the Spanish Empire. Spain was a detrivore. She grew from the destruction and pillage of others, not from internal growth or excellence; as a result, Spanish strength rose like a mushroom in the night and withered again the next day. Its tawdry success was nevertheless blinding in its time.⁵³⁸

This syndrome operates to drown out voices calling for reform in these and better states. Tyranny has no trouble hiding in a tide of gold. It can establish itself firmly

⁵³⁷ Asserting the consequent: [If A, then B: B, therefore, A.] If it's raining, it is wet. It is wet, therefore it is raining. (It may be wet for other reasons, thus asserting the consequent is fallacious.)

⁵³⁸ See Generally, Trenchard And Gordon, *Cato's Letters*.

before anyone cares. It is when this tide runs out and the truth is exposed that trouble begins, for as we have seen, there is no safe way in which a tyrant can be ejected. Every attempt promises to plunge the community into war, and usually ends, simply, with the exchange of one tyrant for another.⁵³⁹ As these examples indicate, boom times can conceal the growth of tyranny, and economic success always threatens to stop reform wherever it prevails.⁵⁴⁰ This is even the case in the United States.

Respondent would have its citizens look at their wallets, at their children about their kitchen tables, smile, and declare that the general current prosperity and 'age of plenty' is proof that theirs must be a healthy political establishment; that the edifice of government and its justice system are working exceptionally well. Moreover, the length and scope of an current economic boom argues to many that they ought not tinker or toy with their system, and that they have no reason to improve their economy or safeguard its health. They often suggest that they may even safely impede and retard the economy, considering how well things are going, on behalf of most every humanitarian or benevolent cause. Petitioner and Respondent have seen nearly half a generation of boom times. Respondent would have the masses rely on this false proof that liberty and justice in America have been achieved, that the people are in no danger, and that they are no longer capable of doing or suffering any injury.

When economic success is allowed to obscure political theory, it can lead a nation to ruin by destroying its will to maintenance and self improvement. This is borne out by the fact that surplus and scarcity have opposite effects on a nation; the latter is the germ of vanity, the father of manners, morals, industry and the arts, while the former, that of arrogance, which breeds laziness, insolence and poverty.⁵⁴¹ Servitude, it has rightly been observed, always begins with drowsiness.⁵⁴² This is induced not only by an inurement to despotism, as already observed, but by the potentially stultifying effects of luxury, which can threaten the well-being of liberty in states if not channeled into productive and competitive uses.

Nevertheless, we must recognize the extreme benefits to justice which spring from economic success. Such wealth can safely replace scarcity if the competitive tendencies of humanity are preserved and channeled into a healthy free-market system, one in which the state checks the centripetal tendency of capital and overcomes its predisposition towards oligopoly, monopoly and eventually Oligarchy. If the object of competition, namely wealth, is by law not permitted to destroy that competition, capitalism can safely expand indefinitely. This technique is directly analogous to Machiavelli's prescription for strict laws to counterbalance the luxury produced by a lush geography.⁵⁴³ The danger of surplus is cited here emphatically *not to discredit* the role of economic success in the ideal system of justice, for it is absolutely crucial thereto, but rather to place those in the lap of luxury on their guard

⁵³⁹ As Kent reminds in his *Dissertations*, Lecture the First.

⁵⁴⁰ This is true even in the individual context, as we observed in *The Sophomoric Discourses*, Book VI, Chapter XXV, Part V.

⁵⁴¹ Montesquieu nearly makes this crucial connection between surplus and scarcity on the one hand and vanity and arrogance on the other, but falling short, we must explain the direct relationship here. See Montesquieu's *Spirit of the Laws*, Part III, Book XIX, Chapter IX.

⁵⁴² Montesquieu, *Spirit of the Laws*, Part III, Book XIV, Chapter XIII.

⁵⁴³ Machiavelli, *The Discourses*, Book I, Chapter I.

against assumptions of perfection in their governments, to render their necessities abundant but their luxury precarious, and remind them that, although they must engineer a system which produces maximal economic success, the fruits of that success must be placed in an artificial condition of competitive scarcity if liberty is to be safeguarded.

THAT THE POLITICAL ROLE OF THE PHILOSOPHER IS THAT OF PROPHET, NOT LEADER

We must now address Petitioner's claim that she has been maliciously prosecuted by the United States because of her candid, prescient, and stinging criticisms of the Respondent's government. While we are sympathetic to the Petitioner's complaint, we must remind the Petitioner of certain truths which, being truths, are beyond the ability of this court to change. The Petitioner, in hurling such direct, incisive, and detailed criticisms at the Respondent, has adopted the mantle of a political philosopher, the robes of the 'prophet.' This is the greatest of all careers; there is no more honorable or important profession. Nevertheless, there are certain fates which attach to that career, fates which cannot be altered by this or any court.

The fate of the Political Philosopher, like that of the prophet, is to foretell the truth, however ugly, and then *to be stoned to death*. We recall the sadly precise words of Liddell-Hart, and urge the Petitioner to reflect upon them without a loss of heart, though we can offer no direct remedy in this area:

[T]rue conclusions can only be reached, or approached, by pursuing the truth without regard to where it may lead or what its effect may be on different interests. History bears witness to the vital part that the 'prophets' have played in human progress—which is evidence of the ultimate practical value of expressing unreservedly the truth as one sees it. Yet it also becomes clear that the acceptance and spreading of their vision has always depended upon another class of men—'Leaders' who had to be philosophical strategists, striking a compromise between truth and men's receptivity to it. Their effect has often depended as much on their own limitations in perceiving the truth as on their practical wisdom in proclaiming it. The Prophets must be stoned; that is their lot, and the test of their self-fulfillment. But a leader who is stoned...has failed in his function through a deficiency of wisdom, or through confusing his function with that of a prophet. Time alone can tell whether the effect of such a sacrifice redeems the apparent failure as a leader that does honor to him as a man. At the least, he avoids the more common fault of leaders—that of sacrificing the truth to expediency without ultimate advantage to the cause. For whoever habitually suppresses the truth in the interests of tact will produce a deformity from the womb of his thought.⁵⁴⁴

Petitioner has assumed the prophet's role, and has invited us to assume the mantle of leader, a role for which we are ill suited and in which we are certain to fail, for we, too, are prophets and are fated to suffer as such. There is no more approbation in

⁵⁴⁴ Liddell-Hart, *Strategy*, Preface.

store for us than for Petitioner. The philosopher is a hated figure among the masses and even the elite. As Plato explains:

...so cruel is the condition of the [philosophers] in relation to the state that there is no single thing like it in nature⁵⁴⁵...Compare [the philosopher's nature] to such an experience as this. Picture men dwelling in a...cave with a long entrance open to the light...their legs and necks fettered from childhood, so that they remain in the same spot, able to look forward only, and prevented...from turning their heads [and seeing the entrance]. Picture further the light from a fire burning higher up...behind them, and between the fire and the prisoners and above them [picture] a road along which a low wall has been built, as puppeteers have partitions before [their bodies] above which they show the puppets...See also...men carrying past the wall implements of all kinds that rise above the wall, and human images, and shapes of animals as well...[D]o you think that these prisoners would have seen anything...except the shadows cast from the fire on the wall of the cave that fronted them?...[S]uch prisoners would deem reality to be nothing else than the shadows...

...Consider then, what should happen [if] one was freed from his fetters and compelled to stand up suddenly and turn his head around and walk and to lift up his eyes to the light...And if...someone should drag him thenceforth up the ascent...and...he came out into the light...he would most easily discern the... likenesses...of men and other things, and go on to contemplate the...heavens...the sun and the sun's light...

...[T]hen, if he recalled to mind his first habitation, and what passed for wisdom there and his fellow bondsmen, do you not think that he would count himself happy and pity them? ...And if there had been honors and commendations among them...and prizes for the man who is quickest to make out the shadows as they pass...do you think he would be very keen about such rewards...or...[on the contrary, that he would] endure anything rather than opine with them and live such a life?...

...And consider...if such a one should go down again and take his old place would he not get his eyes full of darkness, thus suddenly coming out of the sunlight?...Now if he should be required to contend...in 'evaluating'...shadows while his vision was still dim and before his eyes were accustomed to the dark...would he not provoke laughter, and would it not be said of him that he had returned from his journey with his eyes ruined and that it was not worth while even to attempt the ascent? And if it were possible to...kill the man who tried to...lead them up, would they not kill him? They certainly would...

[D]o you think it at all strange...[that] a man returning from [above] to the petty miseries of men cuts a sorry figure and appears most ridicu-

⁵⁴⁵ Plato, *Republic*, from 488.

lous, if...blinking through the gloom...[un]accustomed to the...darkness, he is compelled in courtrooms or elsewhere to contend about the shadows of justice...and wrangle in debate about the notions of these things in the minds of those who have never seen justice itself?⁵⁴⁶

We agree with Plato that the enlightened find no kind reception when they return to the cave. They are almost universally mocked and despised; they are presumed ignorant, defenseless and useless by the masses. We know from long experience that most in the cave never believe what you tell them about what the cave really is or who they really are. They simply think you are an idiot. They will never, and we mean never, believe the truth about the shadows on the wall.

We remind Petitioner of this fate and express to her our sympathy. Were there only something we could directly do to reward the philosophers and prophets for their services to truth. Were there only some way we could turn Respondent and those like them away from their all-too-human reactions to truth. We cannot alter the ultimate fate of the philosopher or the prophet. We can only help Petitioner indirectly by voiding her death sentence, and this for reasons other than malicious prosecution. Despite our decree, she will nevertheless remain a prophet and remain fated to die a prophet's death. About that, we regret that there is nothing we can do.

THAT NOBODY WITH A VESTED INTEREST IN ORTHODOXY CAN DISCOVER TRUTH OR INNOVATE.

Petitioner next claims that Respondent has unjustly condemned her for holding an unorthodox belief, namely that natural law demands that relatives be buried. She asserts this unusual belief contradicts standard customs and that the government has punished her for this heterodoxy. We do not agree. Respondent was uninterested in Petitioner's beliefs; the rule under which she was punished was one of strict liability, unrelated to any state of mind. What Petitioner contends to be a failure of government did not occur here, although it is a recurring failure of human nature. Human beings are mired in orthodoxy and rarely can think their way beyond it. Those who innovate and discover truth are never orthodox thinkers, and those with a vested interest in the intellectual status quo cannot innovate or attain true understanding.

In the Athens of his time, Socrates was a nobody. Plato was his hopeless disciple. In history of thought outsiders always make the great leaps and innovations. Those in positions of power, station, and authority are almost always against them. Later generations form orthodox schools and attain power upon these innovations, and become themselves unwilling or unable to innovate further. Their stature, respect and pay depend upon the viability of past ideas and their dexterity with those ideas. It is in their self-interest to see that new ideas are either attributed to themselves or fail despite any potential merit.

If one has not been mocked, belittled, excluded, derided or ignored, there is little chance that they have come up with anything valuable. The great innovators are always downtrodden or outsiders. Einstein was an unknown patent clerk. Michael

⁵⁴⁶ Plato, Republic, 514 A-518.

Faraday was a lowly book-binder. James Clerk-Maxwell was an unpopular lad, picked on relentlessly. The French establishment had Voltaire imprisoned in the Bastille when still a young man. Rutheford was shunned by Cambridge scientists and had to teach at Manchester. Oppenheimer was a weak and bullied child. Margulis' ideas were once rejected by all self-respecting biologists. Van Gogh died in obscure poverty.

The unorthodox opinion, while more valuable than the orthodox, is always subjected to insult and injury. Petitioner has mistaken this fact of human nature for a dynamic of Respondent's government. On the contrary, Respondent's government goes far to blunt and contain this unfortunate human predisposition. The very aristocratization that Petitioner laments in other contexts is a feature which helps preserve her freedom to flout majority opinions and persist in heterodox thought.

THAT A GREAT PEOPLE CAUGHT UP IN THEIR OWN WEALTH AND SPLENDOR USUALLY UNDERSTAND THEIR ERA VERY LITTLE

Respondent contends that throughout these proceedings we have over-indulged ourselves in exhuming obscure and decrepit quotes, and that we gravely err in our reliance on antiquated philosophies and archaic stories. Respondent demands that its system cannot be impugned on the basis of these forgotten tales for they are of no current relevance and are uniformly ignored by substantially everyone. We disagree and remind that the myopic nature of Respondent's era does not render timeless truths the slightest bit obsolete.

Those who read this centuries from our era will roll their eyes, and sigh, wondering how a great people like the Americans could be tricked by the kind touch of a few years. We must not forget how blind and introverted a great people become, who, caught up in their times so completely, fail to understand them. As strength grows, so does confidence, and with it a disdain for the ways of others, particularly peoples of the past. Thus does a great people forget the timeless lessons of history, having forgotten both the bite of tyranny and the sting of regret. Nowhere is this tendency to reject historical principles of truth greater than in politics, however. As Machiavelli observed, we pay dearly for mere bits of statue, arrowheads, the odd helmet or spear, in order to adorn our homes and enhance our lives with some specimen of ancient achievement. In dance, theater, painting, and writing, the ancient examples, while somewhat less revered, are still consulted with a sincere respect. But in the field of politics, in the foundation of republics, the maintenance of states, the governance of kingdoms, the formation of armies, the conduct of wars, dispensations of justice, and augmentation of empires, politicians, generals, and citizens alike ignore the examples of antiquity and the lessons which history emphatically teaches, and this from their proud indolence.⁵⁴⁷

Nations at the height of their power tend to ignore the past and eschew self-searching and innovation. Athens herself only produced great philosophy and history after being humbled and broken by total defeat in the Peloponnesian War. We cannot but censure Respondent for taking such an inherently fallacious position regarding the

⁵⁴⁷ Paraphrase of Machiavelli, *The Discourses*, Book I, Introduction.

classic products of human thought throughout the ages. We urge them to heed the lessons of all ages.

**THAT GOVERNMENT REFERS TO ALL ELEMENTS OF
POLITICAL POWER, NOT JUST THE OFFICIAL STATE
APPARATUS, WHEREBY THE PEOPLE ARE PART OF THE
GOVERNMENT IN DEMOCRATIC STATES**

Government is a term which comprehends the ruling or politically salient structures of a society. In a federal harmonic constitution, or any democratic state for that matter, the People are partially self-governing. They are therefore part of the government to that degree. Government thus ceases to be an entity strictly opposed to the people; they are truly a part of it. The 'government' is the structural result of the real constitution, and a constitution which distributes power to all elements of society necessarily creates a government which includes them all. Thus, a constitution is not a dividing line between government and non-government in such states, but rather a dividing line between holders of various political rights, all of which are part of the government.

This perspective is similar to viewing the liability section of a balance sheet as the portion of assets owned by debt holders rather than merely as debt. Traditionally, the balance sheet equation was phrased thus: assets equal liabilities plus owner's equity. The liabilities are, however, owned by debt-holders as assets of their own. So it is more accurate to say assets equal debt-holders' stake plus owner's equity. The dividing line between liabilities and owner's equity is really just a question of rights holders. Some hold the debt, others the equity, but both are rights-holders. In the same manner, the term government does not bifurcate the nation into public officialdom and private sector. It divides the total political pie into slices, one of which is given to the democratic element. Therefore, like the rights-holders method of balance sheet analysis, the government is a way of describing the political rights-holdings of each part of society. When no part of society is without some political rights, then all of society is to some extent part of the government, for there will be self-rule with respect to those rights and this will be part of the constitutional design of the state. Force of habit will make it impossible to use 'government' in this manner, but we must nevertheless note that this is the word's true meaning.

SECTION II: INTERNATIONAL MATTERS

THAT THE DEMISE OF CONSENT IN INTERNATIONAL LAW THREATENS POLITICAL LIBERTY IN ALL NATIONS AND RETARDS THE COALESCENCE OF LEGITIMATE GLOBAL GOVERNMENT

Next, Respondent argues that its treatment of Petitioner and the deceased was an international matter and should be judged under the rubric of international law, not the domestic constitutional principals of the United States, whether idealized as this court would have them or otherwise. Respondent insists that customary international law excuses its conduct, as do the resolutions of the United Nations, global treaties and *jus cogens* laws.⁵⁴⁸

Respondent is correct in suspecting that international law may condone what they have done, particularly the doctrines of state action, non-interference, and defensive use of force. This body of law, however, is illegitimate law in our opinion, and we refuse to allow the Respondent to assert it. International law is insufficiently grounded in the consent of the governed and therefore cannot justly be applied to the peoples it attempts to control. For that reason, and to that extent, we refuse to apply it.

Respondent insists, on the contrary, that consent in fact permeates international law, as each state as such can consent to international laws on behalf of their peoples, impliedly if not actually. We disagree, however, since consent, especially implied consent, is a farce in the international context.

Contrary to the Respondent's suggestion, the theory of consent in the social contract cannot be transcribed to the international setting, since the consent to a regime is premised upon the ability to chose otherwise, to either change the regime or leave it for another. Socrates confessed that he felt bound to Athens for each of these reasons; he knowingly remained though he could have left, and he had every occasion to influence and change the laws under which he lived.⁵⁴⁹ Yet none can but live on earth, at least so far, and individuals normally cannot institutionally influence the laws of other nations. As a result, there is no free choice in the international context upon which a theory of implied consent can rest. Nobody impliedly consents to live on Earth, nor do they impliedly consent to the customs arising among foreign nations. They have no free choice whatever in these matters. Should we infer instead that the states are ac-

⁵⁴⁸ *Jus cogens* law consists in those principles which are so universally acknowledged that no state is permitted to object to them, despite their sovereign status or their people's decision to the contrary. As defined in the Vienna Convention On The Law of Treaties, Article 53: "...a peremptory norm of general international law (*jus cogens*)... is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

⁵⁴⁹ Plato, *Crito*, from 50D.

tors which consent to the global regime, in a manner analogous to the individual's social contract with the state, we must alienate the principle that legitimacy's fount is the consent of the governed, for in this case such consent will be merely an ancestral artifact, blind and meaningless in any practical sense.

In addition to simple treaties, states have come to recognize implied international laws and be bound by them. This is where we object to international law. There are two main types of such laws, customary international and *jus cogens* laws. Customary international law is a species of international common law; the habits and customs of international dealings gradually receive the protection of courts. These customary international laws do not, however, supersede the terms of treaties. They are applied as a matter of default. On the other hand, *jus cogens* laws actually do supersede treaties. As defined in the Vienna Convention On The Law of Treaties, Article 53: "...a peremptory norm of general international law (*jus cogens*)...is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Thus, *jus cogens* norms become binding upon states, whatever their people say and whatever their treaties contain. They arise by implication, and subsequently defeat all attempts by a people or a state to avoid them. These types of international laws are so devoid of popular consent that we refuse to accept them as legitimate law.

States are not governed by the global status quo, and may not become so by acquiescence for the reason that they cannot legitimately do anything without the consent of their respective peoples, as we have seen. A state cannot legitimately accept anything on behalf of its citizens without their consent, which requires their knowledge of the matter and their positive choice. Without either, there has been no consent to the state action. Consent to international norms thus requires more than the acquiescence of a state, or of its citizens; some positive action to understand and accept the international norm is required at the level of the individual citizen.

The just powers of government are inextricably dependent upon the consent of the governed, and actions in derogation thereof are *ultra vires*, illegitimate usurpations of power belonging to the people. This is merely to restate what Jefferson wrote and Respondent signed:

We hold these truths to be self-evident, that all men are...endowed by their Creator with certain unalienable Rights,...to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. [And] whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.⁵⁵⁰

From this principle, it should be clear that a state is not empowered to consent to some international norm on behalf of its people by mere inaction, for such acquiescence would lack any indicia of popular consent by the citizens. Moreover, such a power would imply the ability to legislate without legislating, impossible to any con-

⁵⁵⁰ Jefferson, *The Declaration of Independence Of The Thirteen Colonies*, Paragraph II.

stitution. Constitutionally speaking, this is not the rule of the one, the some or the many, but rather the rule of the *none*. No theory can justify the rule of none, for every individual can chose to be ruled only by others or by oneself. The choice of being ruled by nobody is as absurd as it is impossible.

THAT NEITHER THE CONSENT OF INDIVIDUALS NOR THAT OF STATES CAN BE IMPLIED IN INTERNATIONAL LAW.

Respondent has suggested that a state's acquiescence to the international status quo will result in the state ceasing to be an autonomous state, becoming rather a part of the larger whole, and that such consent allows the laws applicable to the international community to reach the citizens of the state. Through this 'acquiescence theory,' Respondent seeks to visit on the Petitioner those principles of international law which excuse their killing of her brother and justify her death sentence. Respondent also alleges that we must defer to this international law since the rapid globalization and integration of the planet makes such a step imperative. We reject this thesis, however, on the basis that international law as currently conceived is a threat to justice in general and just global integration in specific. We are far more sympathetic to Petitioner's counter-claim that Respondent's use of acquiescence and quasi-consent in international law is violative of natural right, namely the sovereignty of the individual and consent of the governed. Since the world is indeed integrating quickly, we shall take time to examine both Petitioner's and Respondent's claims in detail, and we shall explain at length why we have come to the conclusion that current international law is so dangerous to liberty.

We affirm that the international status quo contains rules which may excuse the killing of Petitioner's brother under principles of state military action. However, as we have said, we refuse to honor these international law principles, as they violate the consent of the governed. In the international arena, there is no real authority, no real government, no real constitution, and no real consent. Hence, a state's government might try to abdicate its own authority in favor of a government of the international status quo, a government of averages, in a domestic submission to whatever is internationally average or normal. This is a debauchment, however, of the citizens' consent power. Such a government would be based on a popular consent to the indeterminate, which is violative of the notion of consent, since one cannot consent to the unknown. When consent is so given, it is really not given at all, but rather withheld until the unknown becomes known, whereupon consent is either given or not. This real consent may be influenced by a desire to abide by the promise of consent, for consent to the unknown is but a promise to consent in the future. Is such a promise binding? It is *ab initio* unconscionable, since a promise to obey anything potentially includes even the promise to destroy oneself, to enslavement, to the slaughter of one's parents and children, in return for anything or nothing. Such a promise is immediately void and cannot operate to bind a promissor. It cannot be argued that implied consent to such a promise may render it binding when even explicit consent cannot. This is clear because where the actual is impossible, there can be no potential.⁵⁵¹ Likewise,

⁵⁵¹ Aristotle, *Metaphysics*, Book V, Chapter XI, at 1019a10, proving that potentiality is posterior to actuality.

where actual consent is ineffectual, implied consent must also be impotent.

The only objection to this conclusion is that the implied might be different from the potential. The implied, however, is clearly a subset of the potential, as the implied is the inductive corollary of the most probable portions of deductive potentiality. By this, we mean that the implied, as a subsidiary of the potential, represents a preponderance of potentiality. Expressed negatively, that which is not potential cannot be implied, and we have already stated that things not actual cannot be potentially. Briefly, as Aristotle said, this is because the actual defines the thing to which potentiality refers; that x may potentially become y means that there is already something known as y, something we name and say by speaking of potential y-ness, and thus the actual form of y preexists any potential y, even in the case of physical things.⁵⁵²

However we must recall that consent is not physical, a fact which not only puts its potentiality into more obvious posteriority, but also renders acquiescence even more problematical as a basis for implying consent. The reason is simple, for if consent is a cogitational operation, the inaction of the body described as acquiescence is merely evidentiary of the mental state of consent. It must be conceded that the state of corporeal inactivity is more indicative of ignorance than consent, for decisions cause action in most instances, and such actions can be seen as supporting or opposing given propositions.⁵⁵³ Under this analysis, inaction is an unreliable measure of consent. However, those who claim to imply consent through inaction do not really mean inaction. By inaction, they mean non-adverse action, for animate existence of any sort is a type of action, and acquiescence is not intended to mean inactivity, but rather a knowing accommodation, which implies a non-adverse action. Lack of adverse action is evidentially as weak as inaction at distinguishing the mental state of consent from that of ignorance, since like inaction, it more strongly suggests ignorance than consent.

Finally, some will claim that ignorance itself can be said to result from a positive choice and thus may support an inference of consent. Those who choose to remain ignorant of standards are often held accountable for them, as expressed in the maxim, "*Ignorantia eorum quae quis scire tenetur non excusat*,"⁵⁵⁴ (Ignorance of those things which everyone is bound to know excuses not). However, this does not justify inferring consent from ignorance, since this means equally that ignorance *may* excuse where there is no duty to know. In the context of international law, such a duty can only arise from positive national law, which in turn requires the consent of the governed. Justifying consent in this manner, namely, that it is inferred from a duty resting on consent, is to say that consent arises from consent, not ignorance. Thus, this maxim does not establish that ignorance yields consent. Moreover, this distinction is explicitly raised by the maxim, "*Ignorantia facti excusat, ignorantia juris non excusat*."⁵⁵⁵ (Ignorance of fact excuses; ignorance of law does not.) This clarifies that

⁵⁵² See Aristotle, *Metaphysics*, Book V, Chapter XI, at 1035b10, proving that the physical is posterior as well as is the potential, and a summary of potential posteriority.

⁵⁵³ This is derived from the axiom that nobody willingly errs. Nobody wishes to do evil, but many do evil thinking it to be good. See Plato's *Protagoras*, at 358 C-D, and *Gorgias*, at 467 C-468 C and 500 A.

⁵⁵⁴ Hale Pl. Cr. 42.

⁵⁵⁵ 1 Co. 117.

factual ignorance cannot support an implication of consent to usages and norms, for these are factual, and until made into law by consent-based machinery, may be ignored with legal impunity. Therefore, we hold that a nation is not bound by international customs until the consent of the governed is obtained actually, not by implication or vicariously, and Petitioner herein is likewise not bound by any species of implied international consent.

THAT CONSENT ONCE DOMINATED THE LAW OF NATIONS

Respondent next argues that consent is nowadays immaterial in international law, and therefore, Petitioner cannot attack her death sentence or Respondent's conduct and system of government on any lack-of-consent theory. We do not dispute that consent is currently disappearing from international law. However, this fact moves us to condemn international law, not the Petitioner. Moreover, we reiterate that international law does not govern this case, as we refuse to recognize its validity.

During the latter half of the Twentieth Century, consent played an ever-diminishing role in the legitimacy of international legal doctrines. For example, in the fields of national self-determination, crimes against humanity, customary international law and *jus cogens* preemptory norms, consent has taken a back seat to transcendental notions of justice enforced through international organizations and even national adjudicative bodies. This trend, while promising a wider recognition of near-universal beliefs, bodes ill for the development of reliable global cooperation and the eventual organization of a worldwide government. It is therefore a source of instability and injustice. As we have seen, the concept of consent is the bedrock of political stability, upon which every balanced nation is built, and without which no human association can long endure.

Consent once dominated international law, but no longer. International law substantially evolved during the Eighteenth and Nineteenth Centuries,⁵⁵⁶ times dominated by the ideal of consent-based legitimacy. But in the twentieth century times changed and the consent basis was largely discarded. Consent originally dominated the writings of the Nineteenth Century jurists, the decisions of the Permanent Court of International Justice (P.C.I.J.), and those of its successor, the International Court of Justice (I.C.J.). It also figured prominently in the American Legal Institute's *Restatement of the Law of Nations*, the doctrine of customary international law, the principle of self-determination, the persistent objector doctrine, the clean slate principle, and

⁵⁵⁶ Kent explains that "The law of nations, as understood by the European World, and by us, is the offspring of modern times." Kent, James, *Commentaries*, 13th Ed. Part I, Lecture I. It is true, however, that the earliest international law, like *jus gentium* and other archaic doctrines, are over two-thousand years old. *Jus Gentium* was the separate body of law Roman magistrates applied to controversies involving Roman citizens and foreigners. It consisted of all laws common to both Rome and the Foreigner's state. It was thus considered the common law of nations. It was codified by the Byzantine Emperor Justinian in his *Institutes*, Ulpian, Book I, in 533 A.D. Watson, *Roman Law and Comparative Law*, Part II, Chapter XXII. See also, Maine, *Ancient Law*, 5th Ed. Chapter III.

even the jurisdictional principles of the International Court of Justice.⁵⁵⁷ Together, these sources confirm the central role which consent traditionally played in the international legal arena.⁵⁵⁸

By the Twentieth Century, consent had become a bedrock of international jurisprudence. This primacy was confirmed by the Permanent Court of International Justice (P.C.I.J.) in 1927, when it decided the case of the *S.S. Lotus*. On that occasion, the court affirmed that "International law governs relations between independent states...[and] [t]he rules of law binding upon states therefore emanate from their own free will..."⁵⁵⁹ The I.C.J. phrased this consent basis of international law even more succinctly in the *Aegean Sea Continental Shelf Case*, where in a separate opinion, Justice Singh stated, "[I]n the international field, the paramountcy of the doctrine of consent lies at the root not only of the law as enacted, but also of the jurisdiction of the tribunal which administers that law."⁵⁶⁰

As the above quote indicates, the nominal primacy of consent in international jurisprudence can also be seen in the I.C.J.'s jurisdictional policy, the only basis for which is consent. This principle is evident from a cursory review of the I.C.J. charter, Chapter II, Article 36, which limits the jurisdiction of the court to consensual state action, namely the 'reference' of cases in paragraph one and state 'recognition' of jurisdiction in paragraph two.⁵⁶¹ The court affirmed its adherence to the plain meaning of this consent-based jurisdiction in *Nauru v. Australia*, where it stated that "the requirement for consent...is specific to this particular court..."⁵⁶² and again in *Nicaragua v. United States*, where it summarized "the original source of [the court's] jurisdiction to pass upon a dispute involving a particular State is always that State's consent..."⁵⁶³ So intrinsic is such consent to the court's own conception of its jurisdictional legitimacy, that in *Western Sahara*, the court concluded that a concerned state's consent may be required even for the issuance of an advisory opinion. The *Western Sahara* court stated that:

[i]n certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of cir-

⁵⁵⁷ Perkins, John, *The Changing Foundations of International Law: From State Consent to State Responsibility*. Boston Univ. Int'l L. J. Fall, p. 434, 1997.

⁵⁵⁸ Strictly speaking, international law was not *exclusively* dominated by an underlying theory of consent, for in the Seventeenth Century, Grotius proposed a widely accepted theory of international law based on natural law, which disappeared along with the popularity of natural law doctrines during the succeeding centuries.

⁵⁵⁹ *S.S. Lotus*, (Fr. v. Turk.), P.C.I.J. Ser. A, No. 10, at 18 (1927) (italics supplied), as noted by Perkins, *supra*, at 437.

⁵⁶⁰ *Aegean Sea Continental Shelf*, (Greece v. Turk.), 1978 I.C.J. 3, 48.

⁵⁶¹ *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

⁵⁶² *Nauru v. Australia*, 1992 I.C.J. 240, 293.

⁵⁶³ *Nicaragua v. United States*, 1986 I.C.J. 14, 183. (Separate opinion of Judge Elias.)

cumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.⁵⁶⁴

The international primacy of consent was reaffirmed, this time in the context of the persistent objector as recently as 1976, by the American Legal Institute (A.L.I.). Its revised *Restatement of the Foreign Relations Law of the United States* affirmed that the immunity created by a state's dissent from a developing international practice was "an accepted application of the traditional principle that international law essentially depends on the consent of states."⁵⁶⁵

Customary international law has traditionally been a consent driven field as well. In the *Cases Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the I.C.J. reiterated that "it is of course axiomatic that the material for customary international law is to be looked for primarily in the actual practice and *opinio juris* of states."⁵⁶⁶ It is the first of these sources, namely state practice, that state consent is found. This locus of consent was emphasized in the *North Sea Continental Shelf Cases*, where the court reaffirmed the consensual nucleus of customary international law by observing that only a state's willful, self-conscious abstention, and not mere inaction, could support the finding of an international custom. The court stated that only those abstentions which "were based on [a state's] being conscious of having a duty to abstain would [allow one to] speak of an international custom."⁵⁶⁷ This has been interpreted by at least some scholars to indicate that even *opinio juris* based obedience implies a consensual act or abstention on the part of the state.⁵⁶⁸

THAT CONSENT HAS DECLINED IN THE CUSTOMARY INTERNATIONAL LAW CONTEXT

Despite the international history of consent we have heretofore outlined, we believe that consent has declined drastically in international law. For example, we have just explained how customary international law was originally based on consent, and how this resolved into the idea of *opinio juris*. We believe, however, that the *opinio juris* component of customary international law explicitly lacks any consent basis. As the court was careful to summarize in connection with its search for international custom in *Nicaragua v. United States*:

for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by

⁵⁶⁴ *Western Sahara's Spanish Population's Right to Self Determination*, 1975 I.C.J. 12, 25 (being the advisory opinion regarding U.N. resolution 1514 (XV) of 14 Dec. 1950).

⁵⁶⁵ Restatement (Third) of the Foreign Relations Law of the United States (1986), §102, note 7, as observed by Perkins, *supra*, at 438.

⁵⁶⁶ *Opinio juris*: Latin; an intrinsic belief in the general legality or illegality of an act. Text quote from: *Cases Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1885 I.C.J. 13, 29.

⁵⁶⁷ *North Sea Continental Shelf*, 1969 I.C.J. at 45, as noted by Perkins, *supra*, at 439.

⁵⁶⁸ Perkins comes to this unstable conclusion.

the *opinio juris sive necessitatis*. [A state] must have behaved so that their conduct is 'evidence of a rule of law requiring it.' The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.⁵⁶⁹

This is nearly a positivist formula, which attempts to locate customary international law by evidence of subjective belief in strict obligation, notwithstanding the contingent desire or reluctance of the obedient state. This search is one for behavior motivated not by internal consent, but by outward compulsion, the duress of the perceived legal climate. The doctrine of *opinio juris* thus marks a turning point, for it establishes that at least some threads of law may transcend state consent, even suggesting that there can be no customary international law without a transcendent non-consensual sense of obligation. This notion establishes the base from which *jus cogens* law and the doctrine of preemptory norms flow, principles of law which obviate the consent factor altogether, as will be discussed.

The *opinio juris* criterion is not the only area where transcendental and consensual principles come into conflict with respect to customary international law. The state practice criteria, commonly held to be the consent-based factor of customary international law, becomes progressively inhospitable to consent as state practice becomes universalized. Consent begins to matter less as a nation's practice or abstention becomes increasingly idiosyncratic, until its objections in the face of overwhelmingly contrary practice are finally disregarded. This is the phenomenon whereby transcendental law incrementally undermines the persistent objector, in spite of its contention that it ought not to be bound by a universal custom to which it has persistently objected.⁵⁷⁰ Here, as in the *opinio juris* context, the traditionally consensual can be seen to suffer erosion by principles universal in practice, made transcendent in essence. This erosion of consent is only a precursor to that which comes about in the advent of *jus cogens* theories of preemptory norms, as will be seen. We regret that we have to reach this level of legalistic detail, but we want to make clear to Respondent precisely what has happened to consent in the international context and why we therefore reject their international-law defense.

THAT CONSENT HAS DECLINED IN THE NATIONAL SOVEREIGNTY CONTEXT

The field of customary international law is not the only area in which modern trends have destroyed consent. The consent-based doctrines of national sovereignty, especially that of non-intervention, have also been dangerously weakened. The non-intervention doctrine is summarized in Article 2(7) of the U.N. charter, which states that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..." On the surface, this would appear to establish a bubble of inviolability about a state. This clause is followed, however, by an exemption for any "application of

⁵⁶⁹ *Nicaragua v. United States*, 1986 I.C.J. 14, 108 (Quoting from *North Sea Continental Shelf*, 1969 I.C.J. at 44.)

⁵⁷⁰ Weston, *International Law and World Order*, Chapter II, Part I.

enforcement measures under Chapter VII.” This exemption means that the doctrine is restricted in application to, at least, non-chapter-seven issues. This shrinks the doctrine, insuring that the consent of states regarding the scope of their own domestic jurisdiction will be rendered irrelevant if an action is determined by the U.N. Security Council to be a “threat to the peace, breach of the peace, or act of aggression...” This means that the Security Council can determine the applicability of the non-intervention doctrine in a given situation, which is, practically speaking, no different from a power to decide the scope of a state’s own domestic jurisdiction on an ad-hoc basis. Such a power eviscerates the consent basis of national jurisdiction, since such ceases to be the product of any popular will, duly expressed through representative state institutions, and rather becomes a decision within the complete discretion of the Security Council, a body whose composition is governed not by consent, but by historical quirk.⁵⁷¹ Therefore, the principle of non-intervention, while originally appearing to be a positive guaranty of state independence, becomes merely a promise by the United Nations to respect those areas which its oligarchically composed Security Council deems to be no ‘threat to the peace, breach of the peace, or act of aggression’. The consent of the state becomes totally irrelevant to not only the determination of its own domestic jurisdiction, but also its right to be free from intervention. Properly speaking, States have no such right under Article 2(7) in light of Chapter Seven. They merely enjoy a *privilege* of non-intervention, revocable at the pleasure of the United Nations. Their consent is immaterial.

In fact, the irrelevancy of state consent in the determination of domestic jurisdiction, was announced by the P.C.I.J. long before the birth of the United Nations, in its advisory opinion on *Nationality Decrees Issued in Tunis and Morocco*, where it held that the question of domestic jurisdiction:

is a relative question; it depends on the development of international relations...it may well happen that, in a matter which...is not, in principle, regulated by international law, the right of a state to use its discretion [in determining whether a matter is solely within its own jurisdiction] is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction...is limited by the rules of international law.⁵⁷²

⁵⁷¹ The United Nations charter itself shows the diminishing role which consent has come to play in international law, for the charter establishes a vehicle curiously deficient in the consent-based structures common to most mixed constitutions. The charter’s primary departure from consent is found in its provision for a representational structure which under-represents large and powerful states in the General Assembly, since representation there is one vote per nation, and over represents weak nations which sit permanently with veto power on the Security Council, this by no right save historical anomaly. The representational system of both chambers reflects no consent principle of agency or representation. They are not based on merit, nor on relative power, size, contribution, desert, or any timeless principle of representation save the unitary egalitarian principle of ‘one nation one vote’, and not even this in the Security Council.

⁵⁷² *Advisory opinion on Nationality Decrees Issued in Tunis and Morocco*, P.C.I.J., Series B, No. 4, p.24.

This was subsequently adopted by the I.C.J. in the *Nuclear Tests* case.⁵⁷³ This adoption put the entire question of domestic jurisdiction and non-intervention, when not in the Security Council's hands under a Chapter Seven exception, entirely in the hands of the court. The court can effectively determine the scope of domestic jurisdiction since it is entitled to decide the 'international obligations of states' by application of "international customs and conventions,"⁵⁷⁴ and then determine whether such obligations restrict domestic jurisdiction within the meaning of the P.C.I.J.'s *Tunis and Morocco* holding. This amounts to a double eclipse of consent by the non-intervention doctrine.

THAT CONSENT HAS DECLINED IN THE FEDERAL COMMON LAW CONTEXT

Respondent protests that we should not censure them for the shortcomings of international law since they were not its creators, and since it is distinct from domestic American law. We emphatically disagree. International law has gone far in eroding the consent basis of the United States' own law and its derivative causes of action. In *The Paquete Habana*, the Supreme Court confirmed that international law is "part of our law, and must be ascertained and administered by the courts...as often as questions of right depending upon it are duly presented..."⁵⁷⁵ When such international laws are formed in the absence of consent, they clearly can become non-consensual Federal common law. Moreover, these non-consensual laws may create individual liability and generate private causes of action. This liability of private individuals for violation of non-consensual international laws is explicitly stated in *Kadic v. Karadzic*.

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.⁵⁷⁶

This is *a fortiori* the case in regard to *jus cogens* law, as was reiterated in *White v. Paulson*, where the United States Court of Appeals stated that federal courts "have the authority to imply the existence of a private right of action for violations of *jus cogens* norms of international law."⁵⁷⁷ This confirms the ultimate obviation of consent in cases arising under federal law between American citizens and even aliens.

The most shocking example of how international law has impaired domestic consent and hence the democratic element of the American system is an alien's power to bring claims under the Alien Tort Claims Act. Under this act, no new private right of action is created. Instead, those already existing under international law are recognized as sufficient to bring suit under the act. As confirmed in *Abebe-Jira v. Negewo*,

⁵⁷³ *Nuclear Tests* (Australia v. France) 1974 I.C.J. 253, 365. (as noted by Perkins, *supra*).

⁵⁷⁴ *Statute of the International Court of Justice*, Chapter II, Article 38.

⁵⁷⁵ *The Paquete Habana*, 175 U.S. 677 (1900).

⁵⁷⁶ *Kadic v. Karadzic*, 70 f. 3d 232, 239 (1995).

⁵⁷⁷ *White v. Paulsen*, 997 F. Supp. 1380, 1383 (1998).

the act “does not provide a private right of action. On its face, section 1350 requires the district courts to hear claims ‘by an alien for a tort only, committed in violation of the law of nations.’”⁵⁷⁸ This means that an alien may come to an American court and sue an American for laws to which that American in no way consented, either expressly by vote or impliedly by conduct. This is a perverse doctrine, particularly for a nation like the Respondent’s, which we thought was committed to the principle of the consent of the governed.

Respondent contends that there are limitations to such non-consensual exposure, and there are even threads of consent which govern these limitations. For example, the act itself was a product of representative legislation and thus consensual. We agree, but this cannot be said of the United States Supreme Court’s pronouncement in *The Paquette Habana*, supra, where international law was inducted into federal common law. This was merely a judicial decision interpreting the role of international law, and rests solely upon the consent of the people to both the Presidents who appointed the Supreme Court’s justices and the Senates which confirmed them. Accordingly, criticism of this broad expansion of federal law must flow not from its lack of direct consent, but rather from its violation of the separation of powers, which in turn violates consent, namely that of the people of the United States, who ordained a constitution featuring a limited government of separated powers.

The importation of international law into federal common law is a broad act, one which drastically expands the positive law of the United States. It is, therefore, a legislative act, beyond the legitimate scope of the United States Supreme Court’s Article III powers, as defined in partial obversion by Article I’s conferral of all legislative powers upon the Congress. Viewed thus, the separation of powers is violated by the *Paquette* decision. Not only is this importation likely to be a legislative act, it is a usurpation of an explicit enumerated power under Article I, Section 8, which grants to Congress the right “to define and punish...violations of the law of Nations.”⁵⁷⁹ In either analysis, Respondent is guilty of violating the separation of powers.

Respondent argues that the *Paquette* decision merely interprets the prior action of Congress with regard to international law, and that such is consensual in light of the Article I Section 8 grant of power to define and punish violations of international law. We believe that such a Congressional act, automatically incorporating all international law, would remain violative of consent, however, for it would be a quintessentially unconstitutional delegation of legislative power. A Congressional delegation of legislative power must be made pursuant to a Congressional statute which “[lays] down...an intelligible principle to which the person or body authorized [to exercise delegated legislative power] is directed to conform.”⁵⁸⁰ Notwithstanding the fact that this standard itself, in our opinion, violates the separation of powers, it is clear that the law of nations is made without even this faint restriction, by bodies and forces under no such American Congressional restriction. To allow them to legislate international law on America’s behalf plainly violates the delegation doctrine in a manner destructive to the consent exercised by the people through their elected Con-

⁵⁷⁸ *Abebe-Jira v. Negewo*, 72 F. 3d 844, 847 (1996) (Citing and quoting from 28 U.S.C.A. § 1350 (West 1993)).

⁵⁷⁹ *United States Constitution*, Article I, Section 8.

⁵⁸⁰ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

gress. We therefore are prepared to grant Petitioner's motion for a permanent injunction, preventing Respondent from importing international law into federal common law by judicial means. We take such extreme action because we are particularly alarmed at the direction these international doctrines are taking. This is a minor abridgment of consent, however, when compared with the vast debauchment of consent wrought by the theory of *jus cogens* preemptory norms in the international arena. In fact, the domestic demise of consent is but a facet of the wider ramifications of *jus cogens* law.

THAT CONSENT HAS DECLINED IN THE JUS COGENS CONTEXT

The role of *jus cogens* theory in destroying the consent basis of international jurisprudence was explained by the I.C.J.'s Judge Kreca, in his dissent in *Bosnia & Herzegovina v. Yugoslavia*.⁵⁸¹ Although tarnished by his déclassé status as Yugoslavia's appointive judge pursuant to I.C.J. charter Article 31, paragraph 3, his opinion nevertheless clearly exposes the process whereby *jus cogens* jurisprudence came to prevail over the free will of states. He summarizes:

The division of international law into a 'lower' and 'higher' law opened the way towards the conceptualization of preemptory norms of general international law (*jus cogens*), effected by Articles 53 and 64 of the Convention on the Law of Treaties of 1969. As Judge Ammoun put it in his separate opinion in the *Barcelona Traction Case* (Second Phase, 1970): 'through...the practice of the United Nations, the concept of *jus cogens* obtained a greater degree of effectiveness, by ratifying, as an imperative norm of international law, the principles appearing in the preamble to the charter'... *Jus cogens* creates grounds for a global change in relations of State sovereignty to the legal order in the international community and for the establishment of conditions in which the rule of law can prevail over the free will of states.⁵⁸²

Judge Kreca's observation regarding higher and lower international law is shrewd, for it essentially grasps the supervision of transcendental ethical norms over consent-based law.

THAT CONSENT HAS DECLINED IN THE TREATY CONTEXT, ESPECIALLY IF JUS COGENS IS IMPLICATED

We are alarmed that the rise of *jus cogens* jurisprudence has begun to strip consent factors away from other heretofore consent-based legal doctrines. A clear

⁵⁸¹ *Bosnia & Hertzegovina v. Yugoslavia*, 1996 I.C.J. 595, 1996 I.C.J. 803, 709.

⁵⁸² *Bosnia & Hertzegovina v. Yugoslavia*, 1996 I.C.J. 595, 1996 I.C.J. 803, 709 (Judge Kreca dissenting).

example of this is seen in the recent erosion of the 'clean slate' principle of successor state obligations, as seen in the context of newborn states. This will be examined at length. But first, it is helpful to understand why the newborn state is a particularly pungent context in which to observe the modern demise of consent. Many argue that in the absence of actual state consent, implied consent may bind a nation to international law. This clouds the issue of transcendental *jus cogens* law, and eases the need for *jus cogens* to justify its dispensation with consent-based legitimacy. However, this obscurity is not possible in the case of newly formed states, and thus, it is profitable to analyze the collision of consent-based legitimacy and *jus cogens* jurisprudence in the context of the birth of a brand-new state, where there is no possibility of obligations arising from implied consent. This is precisely where the principle of the 'clean slate' is applied, for clearly, a newborn state is either bound by *a priori* legal strictures, or it is bound by nothing at all, becoming incrementally bound only by its *a posteriori* decisions based on some form of consent.⁵⁸³ Consequently, it is here that one can see most clearly the erosion of consent wrought by transcendental law, i.e., *jus cogens* doctrines.

Can a new state be bound by any preexisting obligations? In the case of *Bosnia and Herzegovina v. Yugoslavia*, supra, the I.C.J. debated this topic primarily within the context of treaty obligations, but indirectly dealt with the application of *jus cogens* to a newborn state as well. The court struggled with whether it ought to apply the 'clean slate' doctrine to the new Yugoslav state, thereby exempting it from obligations arising from its predecessor's acceptance of the Genocide Convention. The court answered this question in the negative, holding that the new Yugoslav state was bound by and had violated its predecessor's Genocide Convention. This allowed the court to legally condemn Yugoslavia's genocide as a treaty violation, but also destroyed the consent basis of the clean slate principle.

The court summarized the traditional clean slate doctrine as being "the principle that a new State ought not in general to be fettered with treaty obligations which it has not expressly agreed to assume after it has attained statehood..."⁵⁸⁴ In a separate opinion, Judge Weeramantry argued strongly that the strict application of human rights and humanitarian treaties to successor states formed a valid exception to the clean slate doctrine, since such obligations did not actually impair the sovereignty or autonomy of the new state. This shocking conclusion arose from a systematic analysis which redefined sovereignty in ever smaller terms, ultimately removing certain fields such as human rights from the scope of state consent.

Although he acknowledged that "[t]heoretically, the clean slate principle can be justified on several powerful bases, including the principle of individual State autonomy, the principle of self-determination, the principle of *res inter alios acta*, and the principle that there can be no limitations on a State's rights, except with its consent," Judge Weeramantry contended that there could be "a deviation from the clean slate

⁵⁸³ There is a third possibility, namely that the new state might become subject to new *jus cogens* law during its existence, having once been free from all *jus cogens* law. This, however, is analytically no different from being so bound *a priori*, and thus we shall not treat of it here.

⁵⁸⁴ *Bosnia & Herzegovina v. Yugoslavia*, 1996 I.C.J. 803, 643. (Separate opinion of Judge Weeramantry.)

principle, [if] sufficiently cogent reasons should exist to demonstrate that the new State's sovereignty is not being thereby impaired."⁵⁸⁵ This appears to be a respectful preservation of consent-based jurisprudence, but it guts consent of its essential role and meaning. Several of the arguments deserve individual attention in order to see the incremental creep of transcendental law into heretofore consent-dominated realms.

Judge Weeramantry's first argument for binding a newborn state to a predecessor's genocide treaty is that "in such a convention, the contracting States *do not have any interests of their own*; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention."⁵⁸⁶ But this can only mean that the subject of the treaty, in this case the welfare of state citizens, is not a state interest. This destroys the notion, ordained by Locke, that the welfare of the governed is the entire and sole legitimate purpose of state action. If citizen welfare is not a State interest, it is no longer possible for the "utmost bounds of [legislative power to] be limited to the public good of society," as Locke asserted, since states would be explicitly freed from any such responsibility.⁵⁸⁷ Such is a cataclysmic interpretation of state interests, one which has often supplied the key ingredients to political persecution, including genocide, of unpopular indigenous citizens. Any theory which purports to absolve a state of an interest in the welfare of its own citizens, equally gives states permission to ignore such welfare. Thus, the theory that human rights do not implicate state interests must be carefully avoided, even when, as here, it is invoked on behalf of the citizens. Such a theory can, at best, only infect States with an institutionalized dereliction of responsibility, and at worst, supply them with a justification for the very discrimination and persecution which the theory attempts to remedy. Thus, the court's struggle to carve an exception into the clean slate principle upon this ground leaves no theoretical foundation for consent-based government and invades consent-based sovereignty to the extent necessary to impose a universal principle of ethics upon a state, precisely as would a *jus cogens* preemptory norm.

A second reason suggested by Judge Weeramantry for binding newborn successor states to a predecessor's genocide treaty is that the treaty transcends state sovereignty:

The Genocide Convention does not come to an end with the dismemberment of the original state, as it transcends the concept of State sovereignty...[W]ith human rights and humanitarian treaties, we are in a sphere which reaches far beyond the narrow confines of State sovereignty, and enters the domain of universal concern.⁵⁸⁸

This is nearly to restate the first argument, that State concerns do not include issues of human rights. Whereas the first argument asserted that human rights were 'outside of' state interests, this asserts that they 'go above' state *sovereignty*. There are two possible interpretations of this, first, that human rights are part of state sover-

⁵⁸⁵ *Bosnia & Herzegovina v. Yugoslavia*, 1996 I.C.J. 803, 645.

⁵⁸⁶ *Bosnia & Herzegovina v. Yugoslavia*, 1996 I.C.J. 803, 646. (Italics supplied).

⁵⁸⁷ Locke, *Second Treatise of Government*, Chapter XI, § 135.

⁵⁸⁸ *Bosnia & Herzegovina v. Yugoslavia*, 1996 I.C.J. 803, 647.

eignty but extend beyond it, or second, that they reside entirely beyond state sovereignty and are no part of it. The former interpretation is the more literal, for even if human rights did reside in a 'sphere which reaches far beyond' state sovereignty, this would not necessarily mean that such concerns were no part of state sovereignty, for that which reaches beyond remains partially within by definition. However, only the latter interpretation can support the claim that forcing treaties upon successor states does not impair sovereignty. Only if 'reaches beyond' means 'exists entirely beyond' can human rights mandates not infringe state sovereignty. This being the only interpretation which supports the desired exception to the clean slate principle, it becomes indistinguishable from the first, save that it refers to sovereignty while the first referred to interest.

These predicated objects are not identical, for interest refers to the state's scope of concerns, whereas sovereignty refers to its power. Thus, this second argument invites us to conclude that human rights are not within a state's power, a supposition which is either an empirical question, or a normative proposition incompatible with consent-based sovereignty. If the former is the case, then human rights treaties could be lawfully forced upon nations which had, in fact, no objective, actual power over their own citizens' human rights issues. Such may be a workable exception, subject only to argumentation over the indicia of objective state power. But Weeramantry is arguing *not* that state impotency excuses the external mandates, but rather that such mandates are not within the *legitimate* power of states. This is not stated overtly, but rather implied by the Judge's adversion to 'universal concern', which suggests not objective power, but rather moral interest. Thus, legitimacy is set up as a limitation to sovereignty, excluding therefrom matters of human rights.

In this light, the second argument suggests that human rights mandates may be imposed on successor states because human rights issues are not part of the legitimate sovereignty of states. Again, this runs afoul of the Lockean principle that legitimate state power is defined by these very interests of the citizens, and that governments are bound to safeguard them as trustee and agent. Here, the argument fails in its attempt to carve out an exception to the clean slate principle without impairing consent-based sovereignty. It merely destroys the idea of legitimacy which guides sovereignty, and redefines sovereignty in a manner useless to any government dependent upon popular support. One can scarcely imagine the difficulty of announcing to one's citizens that their human rights interests were outside of the government's legitimate power. Such an announcement could only be easy for a tyrant, and it would, in essence, define him as such.

A third argument supporting the imposition of humanitarian obligations upon a newborn state is that such rights were never the state's to give in the first place, belonging rather to the people naturally, "by virtue of their humanity. Human rights are never a gift from the State...they represent an entitlement to which [the citizens] were born."⁵⁸⁹ This is welcome language indeed, obviously argued in the alternative to the prior theories, for it assumes such rights cannot be alienated from the individual and therefore cannot be imposed upon the people by the state, for such rights do not belong to the state. However, if they do not belong to the state, they belong even less to an international body. If they belong instead to the people by virtue of their human-

⁵⁸⁹ *Bosnia & Herzegovina v. Yugoslavia*, 1996 I.C.J. 803, 647.

ity,⁵⁹⁰ then an international body has no more right to confer them upon a people than does the state, unless it presumes to divest the people of these inherent rights and then bestow them back upon the people in the very manner which is said to be contrary to humanity. This, in fact, is precisely what is done when the consent of the people is ignored and such rights are mandated upon a new government and its people.

The fourth reason adduced in support of forcing such treaty obligations upon newborn states is that they embody "rules of customary international law...[and] these principles continue to be applicable to both sovereigns and subjects, irrespective of changes of sovereignty." The opinion proceeds to cite the writings of Jenks, who observed that it is "not clear why, now that the rules established by multipartite legislative instruments constitute so large a part of the operative law of nations, a new State should be regarded as starting with a clean slate in respect of rules which have a conventional rather than a customary origin..."⁵⁹¹ Indeed, it is not clear why states should be born with a clean slate if their consent is irrelevant to *any* law, not just customary international law. This statement merely argues that congruity requires consent to be stripped from every calculus of sovereignty since it has been divorced from customary international law. The validity of such a divorce in the case of customary international law is offered as a given, and congruity is offered as a reason to extend the unexamined dispensation of consent to other areas of sovereignty. This demonstrates dramatically the power that a marginal relinquishment of consent in the field of customary international law, just as in *jus cogens* law, can have upon all areas of sovereignty, for congruity can establish a basis whereby those rights which offend little in the abstract, can be applied to the fatal detriment of consent-based government.

THAT INTERVENTION WILL NOT VIOLATE THE CONSENT BASIS OF SOVEREIGNTY IF THERE IS NO CONSENT-BASED LEGITIMACY IN THE GOVERNMENT TO BEGIN WITH

There can be no blinking at the fact that genocide is an apocalyptic tragedy which must be prevented by the nations of the world. However, as the *Bosnia-Herzegovina* case demonstrates, the court is unclear about how such an effort can proceed without violating the principles of consent which underlie the doctrine of non-intervention and legitimate sovereignty. We hold that the answer is found in the adoption of stricter consent requirements, not in the obliteration of consent doctrines. Where the consent of the governed is in perfect operation, genocide cannot take place; when it does, consent is defective, and international agencies therefore do not violate any legitimate sovereignty by intervening. In such instances, they are displacing illegitimate sovereignty, that not founded upon effective consent. This is true in most cases of genocide, but it is invariably true with respect to the consent of the massacred. It is their consent which is at issue, not merely the majority consent of the citizens, for majority consent can miscarry badly, as history has amply shown. Therefore, intervention will not violate the consent basis of sovereignty if there is no consent-based legitimacy in the government to begin with, or if a minority's consent is wrongfully disparaged by the government, in which case, with respect to that minority consent, intervention is not a violation of consent.

⁵⁹⁰ A fumbling invocation of natural right, about which more will be said later.

⁵⁹¹ *Bosnia & Herzegovina v. Yugoslavia*, 1996 I.C.J. 803, 648.

The only controversy suggested by this line of reasoning surrounds the magnitude of minority consent upon which intervention could be justly based. This is an issue which generates alarm, for minority opinion is an inevitable by-product of democratic institutions, and every preponderance of public opinion has a coefficient of disagreement in a free society. Were international intervention justified by such disagreement, democracies, and particularly republics, could be lawfully destroyed by every decision made without total unanimity. Every divergence of opinion could support a lawful invasion. The *jus cogens* concept of preemptory norms fails to answer this question of what modicum of minority opinion justifies an intervention. It fails to answer the question of how to guarantee the effective operation of minority opinion in general, for it is founded merely upon some majority opinion. It may supply a moral fig leaf for intervention, but in the end, it fails to justify the minority rights of those on whose behalf it operates, because it is essentially a rejection of minority right. A *jus cogens* norm is invariably a majority opinion in relation to the minority state opinion, which is, respectively, a majority opinion in relation to the persecuted local minority. *Jus cogens*, therefore, merely forces a majority opinion upon a minority, on the grounds that this minority *is doing so* to a sub-minority. It cannot logically claim to be supportive of minority rights *per se*, for it only supports those minorities whose opinion is consistent with its own.

THAT JUS COGENS IS ESSENTIALLY A MAJORITY RULE, STRIPPED OF THE CONSENT FEATURES WHICH NORMALLY INSURE THAT MAJORITY RULES ARE JUST.

Thus it is clear that transcendental doctrines of law, such as *jus cogens*, have eroded the basis of consent in international law without substituting any adequate principle of organization upon which states may structure their interrelations. It is essentially a majority rule, stripped of the consent features which normally insure that majority rules are just. The rise of *jus cogens* law thus presents a philosophical crisis, for it overthrows the consent basis of modern political right and substitutes therefor a paternalistic, majoritarian regime reminiscent of classical natural right and the rule of the wise, largely incompatible with current notions of sovereignty and legitimacy. Clearly, *jus cogens* law easily stands in the shoes of such a natural-law theory; proponents can claim that *jus cogens* principles are just, not due to mass opinion, but rather owing to their congruity with natural law, and thus they transcend the laws and opinions of any country or group of countries. Since *jus cogens* theory becomes self-contradictory when based upon the supposition that universal majority opinion is determinative of justice, as we have already seen, the only logical justification for it is that there exist natural laws which transcend the opinions and laws of states. The result of this logical imperative is the demise of consent in modern international jurisprudence and a reestablishment of the natural-law theory of sovereignty envisioned by the ancients. We are totally unwilling to permit that adoption. We have gone to great lengths to propose a constitution which incorporates both consent and natural right as found in the rule of the wise. We will not allow myopic international doctrines to turn the eyes of mankind away from the light of the harmonic constitution and force the entire species back down into the cave.

Jus cogens doctrine revives the inherent conflict between the rule of the wise and the consent of the governed by eliminating the role of consent altogether, and replac-

ing it with something even worse than the unrestrained rule of the wise, namely the rule of popular opinion. This is a sin that no ancient or modern theorist committed; it is the one theory of government which each condemned with comparable spite as indefensible upon any grounds. Its only advocates have been found among the positivists, who gravitate towards consent for its utility in uncovering and carving out positive law, not for any evidentiary value it has with respect to a vague but binding law of nature.

To understand the wider issues at stake in this conflict and resolve the issues upon the most reliable basis, it was necessary that this philosophical collision be seen in light of the historical struggle between these two schools of thought over the last two millennia. The school of thought inherent in international law has abandoned consent-based legitimacy. For this reason, we reject it, and we censure Respondent for having incorporated it into their legal system. Moreover, we warn them that this adoption will ultimately endanger much that is genuinely good in their system, much that Respondent and the American people rightfully hold dear.

THAT INTERNATIONAL CONSENT HAS BEEN IMPAIRED BY LEGAL POSITIVISM

International consent has also been impaired by the school of thought known as legal positivism. The positivists rejected the very phrase ‘international law’ as improper usage, for the word law was reserved for the positive directives of an established governmental authority. Austin and the positivist school explained that true laws were not natural or unwritten principles, but rather the edicts of some politically dominant entity. Unfortunately, Austin’s definition of law extinguishes the very possibility of consensual government as well as international transcendental law. In Austin’s words:

Every law simply and strictly so called is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its authority is supreme. In other words, it is set, directly or circuitously, *by a monarch or a sovereign number, to a person or persons in a state of subjection* to its author...Every law properly so called is set by a superior to an inferior or inferiors: it is set by a party armed with might, to a party or parties whom that might can reach.⁵⁹²

Such a definition of law precludes the existence of transcendental laws, natural law, and *jus cogens*. Moreover, it renders absurd the idea that sovereignty resides in the people, for it would require such persons to dictate laws to themselves and be both inferior and superior to themselves at the same time and in the same way. Such a definition relegates consent to a strictly evidentiary role, as Kent observed.⁵⁹³ Positivism thus refuses to acknowledge either a natural sanctity or practical utility of consent

⁵⁹² Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, Part I, §1, Lecture VI.

⁵⁹³ Kent, *Commentaries*, 13th Ed. Part I, Lecture I, p.2.

as a foundation of law. It rejects the very notion of consent as a basis for law, relegating it instead to the ancillary role of a pointer, or marker, helpful only to assist in locating positive law. This at once rejects both the ancient idea of natural transcendental law and modern notions of consent-based legitimacy. In fact, Austin viciously rejects the entire proposition of consent being a legitimating force in government. According to him, the ideas that society is based upon the consent of the governed, and that the power of the sovereign flows from the people, are merely restatements of the fact that all nations, even tyrannies, exist through the obedience, even abject suffrance, of their subjects. He summarized his equation of consent with simple obedience thus:

The position that every government continues through the people's consent merely amounts to this; that, in every society, political and independent, the people are determined by motives of some description or another, to obey their government habitually; and that if the bulk of the community ceased to obey it habitually, the government would cease to exist...[However,] that the bulk of every community, without inconvenience to themselves, can abolish the established government...[or] approve of the established government...[such a] position is ridiculously false...[I]n most or many societies, the love or hate of the people towards their established government would scarcely beget a presumption that the government was good or bad.

This suggests that, for the positivists, the *jus cogens* theory is immune from consent-based criticism since it is a positive expression of actual state practice, but invalid nevertheless insofar as it partakes of a natural law which simply does not exist. This is not a radical claim, for a preemptory norm is either a universal state practice or a universally shared moral belief. If it is simply the former, it is acceptable to positivists, but an anathema to moralists; if the latter, then the reverse. Thus, legal positivism plays a role in discrediting and debauching consent in the international context.

THAT THE REJECTION OF SLAVERY ON JUS COGENS GROUNDS ACTUALLY LEGITIMATES SLAVERY

We have seen that for the Enlightenment thinkers, consent was the conduit through which legitimate sovereignty was transferred to the government agent by the masses of free individuals, and that for the classical theorists, consent was the machinery which made the rule of the wise both practical and dependable. Clearly, those who reject such consent as a factor of legitimate sovereignty must necessarily abandon at once the ideas that individual sovereignty is inalienable, that government is the agent of the individual, and that consent is a practical element of a stable constitution. There is much at stake here. There is more to be lost than simply the separation of powers and the notion that all legitimate national power is derived from the consent of the governed. Certainly, these will be forfeited. But rational proofs of the illegitimacy of slavery will be lost, too. If individuals have no inalienable sovereignty, it may be alienated. If power may be exercised over them legitimately without their consent, then they can be legitimately enslaved. The institution of slavery was defended by

those who claimed the better should rule the worse, the stronger, the weaker. Aristotle made this argument in the *Politics*.⁵⁹⁴ But, it was only by demonstrating that no merit whatsoever could empower one person to command another without his consent that slavery was shown to be theoretically wrongful. This was done by Rousseau, who explained that slavery constituted a state of war and a destruction of individual sovereignty.⁵⁹⁵ By eliminating the theoretical arguments against slavery, the moderns have returned to Aristotle's conception, namely that the right may legitimately enslave the wrong, against their consent, if need be. It is ironic that the condemnation of slavery on *jus cogens* grounds should be responsible for a rebirth of the legitimacy of slavery, and yet such is the inescapable result of jettisoning the notions of individual sovereignty and consent-based government.

It is for this reason that the notion of *jus cogens* is inherently a contradiction, a sly substitution of an ostensibly moral regime for a seemingly less perfect one based on human liberty. Being forced to obey a preemptory norm is itself a species of slavery. Is it not torture to be punished by regimes and laws made without the slightest regard to one's consent?

THAT THE PRACTICAL DANGER OF *JUS COGENS* ENFORCEMENT WAS EXEMPLIFIED BY THE AFTERMATH OF THE FRENCH REVOLUTION IN 1789

Respondent insists that it is no slavery to be forced to be free. They are wrong for two reasons. First, as Duruy explained, "those who must be commanded to be free will never be so. Liberty is seized, or what is better, public opinion commands it... Those who would receive it by order would neither be worthy of it, nor capable of protecting it." Such 'forced' freedom is illusory in practice and impossible to maintain. Second, if a person can be divested of their consent and forced to obey a just law, what is to keep them from being someday likewise forced to obey unjust laws? It was not long ago that the Monarchies of Europe united, in the First Coalition, to destroy the Popular Revolutionary Government of France and force her return to the hated Bourbon Tyranny.⁵⁹⁶ At that time, the nations of Europe and around the world held Monarchy to be the preemptory norm. In effect, tyranny was *jus cogens*.

The French experience is deeply instructive, for it presents the spectacle of a universally held norm being forced upon a non-consenting state. It demonstrates that the mere fact of universal or near universal acceptance does not prove the righteousness of an idea, and such universal agreement affords an avenue for tyranny as readily as for liberty or humanitarian benevolence. The French Revolution of 1789 immediately resulted in a popularly established government, made familiar to subsequent generations of English speaking peoples by the often unflattering, but never unfounded, criticisms of Edmund Burke.⁵⁹⁷ The First Coalition was a military alliance organized by the balance of major European states, Monarchies all, who feared the moral threat to their own regimes posed by the ideas of popular government and self-determination

⁵⁹⁴ Aristotle, *Politics*, Book I, Chapter III, at 1253b1

⁵⁹⁵ Rousseau, *The Social Contract*, Book I, Chapter IV.

⁵⁹⁶ Dodge, *Great Captains-Napoleon*, Book I, Chapter III.

⁵⁹⁷ See generally, Burke, *Reflections on the Revolution In France*.

pullulating in France. The Coalition represented the most civilized and advanced nations of the Earth, who shared the belief that Monarchic systems were the only legitimate form of government. Justified by this preemptory norm, the nations of Europe undertook to replace by force the democratic French government with a Monarchy headed by a restored Bourbon king. Their initial failure catalyzed the rise of Napoleon, whose penultimate defeat in 1812 afforded the allies (then in their Sixth Coalition!) the opportunity to erect the brief government of King Louis XVIII. Nothing proves that such a flawed opinion of *jus cogens* law might not again prevail someday. Without the theoretical underpinnings of consent-based government, it is all the more likely that such opinions might resurface. It is improbable that all *jus cogens* opinions will be just, and when they are not, no basis will remain for disobeying them, since group opinion will override even the correct beliefs of a dissenting state.

THAT ANCESTRAL CONSENT VIOLATES THE CONSENT DOCTRINE:

Having seen the pitfalls of abandoning consent in international law, one is right to question how consent, if it is crucial to international law, must operate. In a consent-based system, how is the justice of a law to be measured? By a majority? By fallible humans? Is justice merely the opinion of a group? Is justice nothing more than the opinion of the stronger? Let us ask how consent can operate to insure justice in international law. In order to answer this question, one must examine the nature of consent, both direct and indirect, within the framework of a mixed constitution.

Consent can be direct, whereby the people vote directly upon a proposal, and it can be indirect, whereby the people vote for representatives, who themselves vote upon bills. Yet, there is a third type of consent, whereby the people elect representatives, who delegate authority to third parties, who then decide law. This is one step removed from representational consent, for the lawmakers are not elected, but merely appointed by the elected. Under such systems, consent becomes ever more vague and theoretical. Such a system can be styled ‘ancestral consent’, to emphasize the gap between the popular mandate and the locus of actual power. It may be a very ancient consent, or merely a delegate’s further delegation. It is such ancient consent that Hobbes adjudged sufficient to justify the establishment of an absolute Monarchy. In Hobbes’ model, the irrevocable consent of a single generation was sufficient to create a legitimate absolute power over all subsequent generations.⁵⁹⁸ Hobbes described the resulting governmental entity thus:

The only way to erect such a common power [of civil government is for the people] to confer all their power and strength upon one man, or upon one assembly of men...and therein to submit their wills, everyone, to his will, and their judgments, to his judgment...as if every man should say to every man, I authorize and give my right of governing my self to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner⁵⁹⁹...[such

⁵⁹⁸ Hobbes, *Leviathan*, Part II, Chapter XVII-XIX.

⁵⁹⁹ Hobbes, *Leviathan*, Part II, Chapter XVII. (Original italics removed)

that] everyone, as well he that voted for it, as he that voted against it, shall authorize all the actions and judgments of that man or assembly of men in the same manner as if they were his own, *to the end...*[And the people,] being thereby bound by covenant to own the actions and judgments of [the established] one, cannot lawfully make a new Covenant [of government] amongst themselves to be obedient to any other, in any thing whatsoever, without his [official] permission. And therefore, they are subjects to a monarch, *and cannot without his leave cast off Monarchy.*⁶⁰⁰

Hobbes' formulation represents the most extreme form of ancestral consent, whereby a single generation's consent irrevocably binds the subsequent generations to abject and perpetual obedience. This is yet a form of consent, although it fails to achieve the ends which make consent necessary in the first place. To better see this shortcoming, we must recall the ancients' conclusion that ideal government is of the wise, which being impracticable, must necessarily employ the device of consent, so that the few wise may control the innumerable masses, and so the masses may verify and insure the wisdom of the wise leaders. Consent serves this vital purpose, but Hobbes' ancestral consent does so only once, at the outset, after which the instabilities of the pure constitutions return and continue unchecked, inevitably bringing corruption and revolution. Such minimal consent is insufficient to support a durable government. Thus we must determine how much consent is needed to guarantee the rule of the wise, such that wisdom is practically able to rule, that it is practically able to rule, and its quality adequately verified and insured by the people.

THAT THE PROPER ROLE OF CONSENT IS PERMANENT AND PERIODIC

We have seen that consent is the conduit whereby the individual's sovereignty is entrusted to an agent. However, the operation of consent is also cast in terms of delegations of power. In the context of delegation, the agent described above is the original delegate of the individual's sovereignty. Thus, consent legitimates delegation of power, and where consent is less operative in successive delegations, legitimacy will correspondingly dwindle.

Thus, discretionary sub-delegations of delegated power are illegitimate; legitimacy is confined to the original consensual delegation, and the subsequent delegation is *ultra vires*, beyond the terms of the original consent, provided of course that the original consent did not contemplate such sub-delegations. The original consent, that being the power of the individual to temporarily divest himself of his sovereignty, is limited by the principle of the inalienability of individual sovereignty. If such is inalienable, it may be lent or delegated, but not permanently. Therefore, there must be some ultimate individual power over the sub-delegated quantum of sovereignty, lest it rise to the level of a permanent defeasance.

Moreover, double delegations are by nature blind. And since it is impossible to consent to the indefinite, double delegations are non-consensual and therefore anti-democratic. Mathematically, delegation collapses consent at a rate equal to the num-

⁶⁰⁰ *Id.*, at Part II, Chapter XVIII. (Italics supplied)

ber of potential acquaintances of each delegate, raised to a power equal to the number of delegations, subtracted from the number of citizens, and this amount then divided by the number of citizens. A one is perfectly consensual, a zero utterly non-consensual. In a country of millions where everyone knows a thousand people, a single delegation can go a thousand ways, a second, a thousand-thousand, and a third, a thousand-thousand thousand. In such a system, a double delegation permits a power to given to one of a million different persons. It is not possible for a citizen to know this many people, so a double delegation is by nature blind.

What level of power must an individual retain over his delegated sovereignty in order for it to be still unalienated? If it is to be *his* power, ultimately, he must exercise sufficient control over it. Property principles suggest that his authority must at least rise to the level of a power to exclude others. If a delegated or sub-delegated power is to be thus remotely controlled, the individual must have the practical means of excluding the agent or sub-agent from continuing to exercise the delegated power. This exclusion could be a periodic veto power over the agent's use of the power, or it could rise to the strength of an at-will revocatory power. The former is the least consensual, the latter, the most. The former power will therefore obtain the lowest degree of legitimacy, the latter, the highest.

However, the optimum practicality of government will be found in between these extremes, for the former government will be excessively licentious and irresponsible, (the malady which plagued the ancient ideal of government by the wise), while the latter will suffer from impotence, as it constitutes the anarchic rule of the ignorant. Such was the case of the first French Republic, which contained insufficient delegations. Here, we have the opposite extreme from Hobbes' over-delegative Leviathan. According to Burke, such a government is bound to fail, as it is based on an erroneous and extremist populace, drunken with its interpretation of the rights of man:

They have 'the rights of men.' Against these there can be no prescription, against these no agreement is binding; these admit no temperament and no compromise, anything withheld from their full demand is so much of fraud and injustice. Against these their rights of men let no government look for security in the length of its continuance, or in justice and lenity of its administration.⁶⁰¹

Thus, the optimal mechanics of consent must consist of more than an occasional negative over an agent's use of delegated power, but must not rise to the level of an at-will power to revoke the delegation. To satisfy the former, a positive power to decisively proscribe and influence the use of the delegated power is required. To avert the difficulties of the latter, such positive influence must be only periodic.

To be periodic and yet not destroy the attributes of ownership, a principal's consent must occur more than once, for a single instance would not be periodic. Nor would a double act indicate a period. Only upon the third exercise can a period be deduced, being the average of the intervals between exercises. Yet, if the exercises were limited to three, the power would cease to be under the control of the principal after the third use, and such power would fail to have been infeasible. The final exercise, at whatever interval, would constitute a permanent alienation of individual

⁶⁰¹ Burke, *Reflections on the Revolution in France*, IV(4)(a).

sovereignty. Thus, such exercises of consent must be unlimited in number. They must be potential throughout the life of the individual. This is not to say that they must be exercisable at all times, merely that they must be periodic without end.

Thus, for government power to be optimally legitimate, it must be subject to the consent of the governed *periodically without end*. This proves that there is a paradox of legitimacy, namely that a government must not be entirely illegitimate, without any consent, and equally must not be perfectly legitimate, subject to infinite consent, if it is to be successful over the long term. This paradox can be concealed by denominating the middle position the 'optimally legitimate' amount of consent. This term, however, merely hides the fact that legitimacy is a political extreme, in need of moderation, as Burke noted. This idea violently conflicts with average notions concerning the consent of the governed, self-determination and governmental legitimacy. Since our idea of legitimacy is tied to the notion of consent, the consensual but stupid policy is yet legitimate, while the wise but disliked policy lacks legitimacy. The paradox becomes pungent when the fatally stupid policy is legitimate and the truly wise is not. In such cases, it can appear that the wrong thing to do is the right thing to do.

The existence of a continuum between absolute legitimacy and illegitimacy, wherein one will find a point both legitimate enough to be truly consensual, and illegitimate enough to be practically effective, is another way of describing this paradox. Nevertheless, it is a depiction which renders the debate more tangible, as some institutions will tend towards the extreme of illegitimacy, and others to the opposite extreme of perfect legitimacy. Either extreme is dangerous to public liberty and governmental stability. Government by referendum, initiative, proposition or plebiscite will be as noxious to liberty as the rule of an aristocratic clique.

Parenthetically, we note the following: If a delegate is an elected officer, the consent factor is reintroduced at his level, and the legitimacy of delegated authority is recaptured by the consent of the governed through the new electoral leverage. In this manner, consent can be brought back into operation upon delegates and sub-delegates without tearing the fabric of government. Herein lies the international solution as well as the local, for the reintroduction of consent to international jurisprudence need not topple the superstructure of law and order now so imperfectly tottering upon preemptory norms; rather, it could provide a newfound stability and longevity to the very same edifice.

THAT CONSENT MUST BE RESTORED TO PRIMACY IN THE LAW OF NATIONS

The foregoing demonstrates both the legislative and judicial process whereby consent has been stripped away from international law, the philosophical crisis implicit in that development, and the proper method whereby consent may be profitably and safely reintroduced into the law of nations. That consent has been shrinking as a basis of international law is made clear by the progressive rise of transcendental legal doctrines, particularly in the fields of war crimes, crimes against humanity, customary international law, *jus cogens*, and preemptory norms. The result has been moral and political confusion, particularly when international bodies are presented with demands for relief but cannot act due to consent-based doctrines. The reintroduction of consent

into the law of nations would restore the legitimacy factor of sovereignty, as demonstrated by enlightenment political theory, as well as revive the practical advantages of consent to stable government, as elucidated by classical political theory. These lofty objectives can be achieved by applying consent machinery to delegated power on a periodic but perpetual basis. Until the international community re-embraces consent-based jurisprudence, the nations of the world will lack both the legitimacy and the stability required to achieve the lofty goals announced in their United Nations charter, namely, to maintain international peace and security, to develop friendly relations among nations based on the principle of respect for equal rights and self-determination of peoples, to promote and encourage respect for human rights, and to harmonize the actions of nations in support thereof.⁶⁰²

Therefore, we refuse Respondent's request that their treatment of Petitioner be judged under the rubric of international law. We believe that it is illegitimate law, insufficiently grounded in the consent of the governed. We have gone to great lengths to describe exactly which areas of international law are non-consensual and how they became that way. International law is anti-consent in nature, and for that reason, and to that extent, we refuse to apply it.

THAT INTERNATIONAL INTERVENTION IS UNJUST WITHOUT THE HOST'S HARMONICALLY PRODUCED CONSENT

Respondent next protests that this court is wrongfully intervening in a civil insurrection without consent, as Petitioner is an abettor of her brother's attempted overthrow of Respondent's government, and this amounts to a domestic insurrection or civil war.

We acknowledge that intervention is unjust without the consent of the assisted or molested party. Nevertheless, Respondent consented to our interference by appearing before this court and consenting to our jurisdiction over this case, which they did freely and with knowledge of the consequences, one of which was that their domestic situation would be impacted, either for better or worse, by our resolution. Respondent's government is sufficiently consent based for it to bind its people by its conduct in this instance, although we construe this adequacy very narrowly, since we have found it lacking in many other instances.

THAT PRINCIPLES OF LIBERTY AND POLITICAL STABILITY PROVE THE UNITED NATIONS TO BE PARTICULARLY UNSUITED TO GLOBAL GOVERNMENT

Respondent demands that we state our reasons in full why the U.N. is an unjust entity unsuited for world government. We will begin by reiterating that the United Nations charter depicts a vehicle uniquely inappropriate for the role of global gov-

⁶⁰² Paraphrasing the Charter of the United Nations, Chapter I, Article 1.

ernment, violative at once of every major principle of stability known to political thought. It has an anachronistic system of participatory representation, no federal layerings, no separation of powers, no checks and balances, and no lawmaking power. It is anti-harmonic. Considering its express purpose, to be a forum of international communication and debate, these criticisms seem beside the point. But they are not, for the U.N. goes far beyond being a mere oratory forum. It does not merely opine; it is designed to execute policy as well, especially under Chapter Seven of its charter. Thus, it forms a governmental entity and must bear a constitutional analysis. Therefore, let us consider these shortcomings individually.

First, the U.N. charter is inherently defective in its representational structure. It under-represents large and powerful states in the General Assembly, since representation there is one vote per nation. It over-represents weak nations which sit permanently with veto power on the Security Council by no right save historical anomaly. The representational system of both chambers reflects no organic or logical principle of agency or representation. They are not based on merit, nor on relative power, size, contribution, desert, or any timeless principle of representation save the unitary egalitarian principle of 'one nation one vote', and not even this in the Security Council.⁶⁰³ In the case of the Security Council, given its extraordinary importance as the repository of the U.N.'s enforcement power, this is a particularly obnoxious shortcoming. China, for example, can block the entire U.N. security apparatus at the whim of its fistful of tyrants.

There exists almost no mechanism of checks and balances between the two aforementioned chambers, or among these and the four other principle organs, the Trusteeship Council, the Social Council, the International Court of Justice, and the Secretariat. The few existing checks consist in the General Assembly's electoral process for non-permanent Security Council members and judges of the court. And these are insufficient checks upon the operations of the subject entities. There are checks only by accident in the case election to the Security Council, and they are not designed to accomplish a counterbalancing. Moreover, the system for electing I.C.J. justices is supposed to provide judges with independence, not interference, and check merely the conduct of the parties to the nominating process.

The U.N. has no intrinsic separation of powers which could even be placed in check or balanced, since each body enjoys a mixture of executive, adjudicatory and legislative powers. For example, under Article 30 of the Court's statute, the court makes its own rules of procedure, though this is legislative.⁶⁰⁴ Additionally, under Articles 37-47, the Security Council adjudicates claims of endangerment to international peace, formulates rules, and executes them through its Military Staff Committee, blending all three powers.⁶⁰⁵

Perhaps the greatest weakness of the Charter is found in Article 48(2), which states that the edifice as a whole acts upon states as such, not upon the peoples of the member states, in stark violation of the principles earlier cited by Kent as being requisite to any successful league or confederation. It will be recalled that Kent emphasized the incompetence of federations which act upon states rather than citizens. Kent scathingly remarks that this formula "has proved pernicious or destructive

⁶⁰³ *Charter of the United Nations.*

⁶⁰⁴ *Charter of the United Nations.*

⁶⁰⁵ *Charter of the United Nations.*

to all...federal governments which adopted [it].”⁶⁰⁶ His words are worth revisiting as we consider them in the context of the U.N. Charter. He reminds that the American Articles of Confederation suffered this defect, and hence were an “unfit and unsafe depository of political power.”⁶⁰⁷ One can hardly but conclude that his comments utterly condemn the United Nations upon the same grounds.

The powers [under the Articles] would perhaps have been competent...had they been duly distributed among the departments of a well-balanced government, *and been carried down through the medium of a national, judicial and executive power, to the individual citizens...* But in imitation of all the former confederacies of independent states, either in ancient Greece, or modern Europe, [the Articles] carried the decrees of the federal council to the states *in their sovereign or collective capacity*. This was the great fundamental defect in the confederation of 1781; it led to its eventual overthrow; and it has proved pernicious or destructive to all other federal governments which adopted the principle...The mild influence of the civil magistrate, however strongly it may be felt and obeyed by private individuals, will not be heeded by an organized community, conscious of its strength and swayed by its passions. The history of the federal governments of Greece, Germany, Switzerland, and Holland afford melancholy examples of destructive civil war springing from the disobedience of the separate members...Had there been sufficient energy in [that] government [under the Articles] it might have proved fatal to the public liberty...and the people of this country might have been languishing to this day, the miserable victims of a feeble and incompetent union.⁶⁰⁸

The U.N. Charter, in replicating this basic error, creates just such a ‘feeble and incompetent union’ and creates an identical danger of rendering the citizens of the world its ‘miserable victims.’

A cardinal trait of the United Nations’ structural folly is its infidelity to the principle of consent as the basis of legitimate law and sovereignty at all levels. As we have seen, its representative bodies have abandoned the guiding light of consent as a structuring principle, and are founded instead upon an historical quirk which places five members arbitrarily above the rest, and a *per-capita* state representation that penalizes populous states. Moreover, it is a group whose members are not all mixed governments, a circumstance that invites dysfunction. But the U.N.’s structural abandonment of consent pales in comparison to the International Court of Justice’s growing abandonment of the principle in its jurisprudence, as we have already seen.

⁶⁰⁶ Kent, *Commentaries*, Volume I, Part II, Lecture X.

⁶⁰⁷ Kent, *Commentaries*, Volume I, Part II, Lecture X.

⁶⁰⁸ Kent, *Commentaries*, Volume I, Part II, Lecture X.

**THAT JUST WORLD GOVERNMENT CAN ARISE ONLY BY
UNITING HEGEMONY WITH THE BALANCE OF POWERS
VIA GLOBAL ADOPTION OF
A FEDERAL HARMONIC CONSTITUTION.**

Respondent contends that our criticisms have destroyed the possibility for global cooperation and eventual world government. We know that the idea of unified world government has animated the sentiments and fueled the ambitions of mankind since time immemorial. From Alexander the Great, who thought he might conquer the whole Earth if only he could march down the Ganges, to Hitler, who envisioned a planet enslaved to his thousand-year Reich, global government has long been the obsession of megalomania. But cooler, sharper minds have also been interested in world government. Chrysippus the Stoic posited a world-city; Rome all but built it. Augustine posited the City of God, ascendant over all. The secular power of the Christian Church nearly brought that city to earth. Utopian theorists long for the borderless society. We have already seen the contours of the hegemonic model of international stability, but Respondent has now raised the notion of a global government as a separate inquiry. We agree that it is indeed a distinct question, for a world government would not merely be a hegemon, but a solitary edifice.⁶⁰⁹ We disagree, however, with the claim that our theories have made global government impossible. On the contrary, it is only through our theories that such a government can be constructed at all.

We shall not advance a utopian theory here, but rather observe the implications of the points thus far distilled as they bear upon the subject of global government. We have seen the role of competition as the engine of political liberty, power and stability; we have observed its operation in the doctrines of federalism, mixed constitutions, checks and balances, the separation of powers, capitalism, and the adversarial legal system. We have observed the opposite theory at work; concentrated power, Monarchy, Aristocracy, non-competitive economic systems, communism, socialism, all failures, all incompetent providers of peace, stability, and justice.

We have indeed already outlined the contours of the ideal global government. Earlier we concluded that justice requires an international balance of powers system featuring an equality of plural sovereignties. We can now explain that this equality of plural sovereignties forms *the natural basis for a global federation*, which itself will then be hegemonic. In this manner, the ideal global government can be formed by uniting hegemony with the balance of powers. The ideal global government will be hegemonic as to the whole and perfectly balanced as to the parts, vertically and horizontally. Thus, Respondent was correct in asserting that there is an alternative to hegemony on the one hand and balance of powers on the other. However, the alternative is not 'collective security' as Respondent contended, but rather the perfect unification of hegemony and the balance of powers, which can only be done through a global, federated, harmonic constitution.

⁶⁰⁹ For a detailed account of Chrysippus and the roots of world-government theory in ancient political thought, see generally, Sabine, *A History of Political Theory*, Part II, Chapter VIII.

With this in mind we could proceed to posit the details of a theoretical World State based upon the tried and true principles of successful nationhood, as predicated upon sober assessment of human nature at its worst. We could derive a system not only ideal but practical as well. This would be a noble project, but we are presently looking for the ideal system of justice, not the ideal global government, though these are, secretly, the same thing. Let us therefore follow the subject at hand to its conclusion rather than accepting the tempting invitation to change our perspective.

As the dawn of the twenty-first century casts its rosy fingers over yet another millennium of human activity, the truths distilled from the first three make one thing abundantly clear, there is yet no competent institution or body which could become an effective global government. The world remains Balkanized; neither political hegemony nor ideological paradigm unifies it. Mankind looks awkwardly but longingly towards the international institutions, such as the United Nations, for a glimmer of hope in the quest for world peace under global government. Nevertheless, the truths heretofore derived make this hope seem singularly foolish, especially in the case of the United Nations. Although we have shown the idea of a U.N. global government to be hopeless, we have replaced it with a more realistic possibility of global government according to our model of the federal harmonic constitution. But as we have said, federations arise from threat, and a global government will arise only from a global threat. If we have eliminated the possibility of such a threat, then perhaps Respondent is correct and we have eliminated the possibility of global government. Otherwise, we will have enhanced the possibility of global government.

THAT INTERNATIONAL DOCTRINES OF DEFENSIVE USE OF FORCE ARE INTRINSICALLY UNJUST, AND THE NATION WHICH ABIDES THEM ADOPTS A BANKRUPT POLICY, TO THE DETRIMENT OF ITS NATIONAL PROSPERITY AND THE WELFARE OF ITS PEOPLE.

Returning to the topic of international law, Respondent demands that if we reject the entire body of international law, we should still retain the doctrine of defensive use of force, and that this doctrine shows that the treatment of Petitioner was not unjust under the circumstances. We refuse this demand for the following reasons. We acknowledge that among the principles which collectively compose the body of customary international law are doctrines relating to the defensive use of force. Two such generally acknowledged principles are the requirements of necessity and proportionality in defensive measures.⁶¹⁰ This doctrine was early enunciated by Daniel Webster, who held that defensive foreign intervention required first, a necessity, the likes of which is “instant, overwhelming, and [affording] no moment of deliberation,” and second, a proportionality, such that the defensive action admits of “nothing unreasonable or excessive.”⁶¹¹

⁶¹⁰ *Nicaragua v. United States of America*, [1986] I.C.J. Rep. 14 (Judgment).

⁶¹¹ Daniel Webster, *Letter to the British Ambassador Fox*, regarding the sinking of the steamboat *Caroline*, April 24, 1841. 29 British & Foreign State Papers 1129,

No suggestion could more fundamentally misconstrue the nature of correct military defense than this. As we will observe at greater length later, the maxims of military action are contradictory to both proportionality and necessity. Regarding proportionality, military success is directly related to the degree of preponderance, not equality or proportionality, of force. Superiority is held to be the cardinal ingredient of military victory; and the greatest force possible must always be brought to bear upon the adversary at his weakest or most decisive point.⁶¹² Proportionality must be avoided at all costs, despite the righteous-sounding propositions of Webster, lest the military issue be lost from the start and the action be thus unjustifiable in any sense. This is not to suggest that the end justifies the means, but rather that it certainly can condemn the means.

Military success is likewise directly related to the intensity and perspicacity of deliberation, for only through such cogitation can one arrive at a successful strategy and render certain that result which would otherwise be the elusive product of crass luck. Acting with ‘no moment of deliberation’ is a recipe for military disaster. Successful strategy requires myriad calculations, as Liddell-Hart explained:

[The purpose of strategy] is to diminish the possibility of resistance, and it seeks to fulfill this purpose by exploiting the elements of movement and surprise. Movement lies in the physical sphere, and *depends on a calculation* of the conditions of time, topography, and transport capacity... Surprise lies in the psychological sphere and depends on a calculation far more difficult than in the physical sphere, of manifold conditions, varying in each case, which are likely to affect the will of the opponent.⁶¹³

Obviously, there is little hope in deriving such a strategy in situations which afford “no moment of deliberation.” Defensive operations predicated upon “no moment of deliberation” are bound to miscarry and hence are inexcusable from both the military and the humanitarian perspective. Webster’s suggestion that defensive action is justified only by necessity affording no moment of deliberation serves only to squander the lives and dash the hopes of the nation which relies upon it. There can be no justice in a theory which preordains defeat by establishing, as the sole justification for self-defense, maxims which retard and prevent it.

In fact, Webster has the formula almost exactly backwards, since successful defense, the only type justifiable at all, requires not first *suffering*, but rather *inflicting* upon the aggressor “a necessity, the likes of which is instant, overwhelming, and affording no moment of deliberation,” which will, in Clausewitz’s immortal words, place the opponent “in a situation which is more oppressive to him than the sacrifices which we demand,” which is to say that our efforts must be *out* of proportion to his power of resistance. Proportionality condemns the defensive action to failure, and actions bound only to fail are never justifiable. For these reasons, the traditional re-

1138 (1937), as quoted by Carter and Trimble, *International Law*, 2nd Ed., at 1293, citing L. Henkin, *International Law*, 663-664 (1987).

⁶¹² Clausewitz, *The Art of War*, Book III, Chapter VIII.

⁶¹³ Liddell-Hart, *Strategy*, Part IV, Chapter XIX.

quirements for self-defense under customary international law, namely those of proportionality and necessity, are absurd, dangerous, and manifestly unjust. The nation which sincerely abides by them adopts a bankrupt policy, to the detriment of its national prosperity and the welfare of its people. Therefore, we hold that the doctrine of defensive use of force is itself unjust and cannot possibly justify the Respondent's treatment of Petitioner.

THAT GLOBAL ENVIRONMENTAL DECAY IS A POLITICAL PROBLEM AND ONLY ADMITS OF A POLITICAL SOLUTION, ONE FOUND IN THE HARMONIC GLOBAL FEDERATION.

Petitioner next claims that the United States is unjust in its over-use of world resources and adverse impact on the environment. Respondent counters that although it uses a high per-capita percentage of resources as compared to other nations, this is an unavoidable aspect of its economic and political success, and furthermore, it pollutes less than do most other nations on a per-capita basis. We agree with both Petitioner and Respondent, and we will demonstrate how both of their contentions are correct and interrelated.

The world remains politically divided among adverse nations. Competition among these creates in each a need for economic and military strength. This results in the massive exploitation of resources. Satisfying the material desires of the popular element in various nations results in yet more exploitation of resources. The problem with this is that the world's resources are finite and its environment ecologically fragile. Thus, the political situation of the planet, if continued, will destroy the prerequisites of human life. It should therefore be clear that this is an unjust condition of affairs, and thus Petitioner is correct. However, the injustice can be eliminated only by altering the political reality of the whole system, specifically by eliminating the military competition among nations and placing into check the material demands of the various elements of every nation, particularly those with strong popular elements. For this reason, Respondent is correct. Respondent is wrong to imply, however, that the solution to this state of affairs is beyond its reach. There is a political solution to the environmental problem, and it is the adoption of a global harmonic federation.

By forming a global harmonic federation, the justice of the three-part separation of powers will encompass all, and the whole entity will be a hegemon with a balance of powers among its members. This will mainly eliminate the military competition between the members and ease the distributive inequalities among nations which are at the heart of the global environmental predicament.

PART IV: JUSTICE BY ALTERNATE MEANS

SECTION I: THE MILITARY ELEMENT OF JUSTICE

THAT JUSTICE AND NATIONAL MILITARY POWER ARE MUTUALLY INSEPARABLE AND IN THE LONG RUN SEPARATELY INCONCEIVABLE

Respondent next contends that its treatment of the Petitioner was an inevitable consequence of its need to defend itself and its people in time of war, and that true justice requires a tolerance and allowance for military action; that a just state is a militarily prepared and powerful state, and that the laws of war require the very acts which aggrieved the Petitioner. We agree with all of these assertions except for the last. We do not doubt that justice and national military power are mutually inseparable and in the long run separately inconceivable. Nor do we doubt that the best nation is that which best prepares for war. Nor do we contest that there are laws of war which require and totally justify actions conventionally presumed to be unjust. However, the Respondent's punishment of Petitioner was a military mistake, and the laws of war do not excuse military blunder, however much Respondent may wish that they did. We shall address this topic at length, as we believe that Respondent has enunciated very important principles, even though their application of these is erroneous.

The relationship between the topic of justice and that of war and peace is so intimate that one is comprehensible only in light of the other, and those who profess to expound upon either may avoid negligence only by considering both. There is a symbiosis, obnoxious to the infirm and effeminate, which obtains between force and justice, manifest in the operations of competition mentioned above, alive in the realm of international law, a coefficient which places war and peace in a mutual, perpetual predication and renders national power the ward and guardian of justice. Earlier we noted three maxims of political theory, first, good laws are useless apart from good arms; second, that the best nation is that which best prepares for war; and third, that peace and war bear a reciprocal relationship in which the former is a product of the latter. It is the last of these which explains the necessity of investigating military theory in any responsible work of political theory and jurisprudence. The first maxim, however, recites the proof of this requirement, and the second, its consequence.

To understand constitutional change and political theory in general, war must be understood. Perhaps the most convincing reason why the study of military matters is crucial to political theory is that the primary cause of constitutional change is war.

This lesson has often been marginalized, even by the greatest of political philosophers, but it was the unerring Machiavelli who most explicitly demanded that we notice the relationship between war and political theory, for which he has earned an undeserved opprobrium. Socrates, Plato, and Aristotle held pure military philosophy to be ancillary to the more basic topics which their minds explored with definitive precision. One is tempted to ask the reason for this. It appears to the casual inquisitor that the use of force is merely a mechanical topic, useless apart from an understanding of the political and social good. Such a conclusion produces a comfort which grows ever more awkward as the mind expands, since a more careful analysis makes it clear that the operations of force pervade both Aristotle's *Politics* as well as Plato's *Republic*,⁶¹⁴ and ultimately supervene in every discussion of justice. For instance, one cannot treat of the constitutional cascade apart from understanding the operations of force, a point which applies doubly to the role of the executive in executing the laws. And it is therefore clear that whoever discusses politics must include an analysis of the role of force, which is, in fact, the art of war.

Machiavelli made this point in each of his major works, but the most outstanding enunciation comes from his treatise *The Art of War*. Many are familiar with Sun Tsu's book of the same name, and some with Jomini's.⁶¹⁵ But Machiavelli's is outstanding among them as it is logically inseparable from his political theory advanced in *The Discourses*. These others advanced no explicit political theory, committing essentially the inverse error of the Ancients. Only Machiavelli united the two fields and made a conspicuous display of their interrelationship. This is not to deprecate Sun Tsu's Taoist classic, nor Baron Jomini's encyclopedic masterpiece. It is necessary, however, to pay a decent respect to context, and only from the understanding of war can the context of peace and justice emerge. Let us review Machiavelli's contention, still as pungent and compelling today as it was so long ago.

THAT THE BEST LAWS IN THE WORLD WILL BE DESPISED AND TRAMPLED UNDER FOOT IF NOT SUPPORTED BY MILITARY POWER⁶¹⁶

Machiavelli tells us again and again that good laws cannot exist without good arms.⁶¹⁷ This is to say that justice requires good arms, and that an ideal system of justice must include an ideal military establishment. In his own words, he notes that:

All the arts that have been introduced into society, for the common benefit of mankind, and all the ordinances that have been established to make men live in fear of God, and in obedience to human laws, would be vain and insignificant if they were not supported and defended by a military force; this force, when properly led and applied, will maintain those ordinances and keep up their authority,...but the best ordinances in the

⁶¹⁴ See Generally, Craig, *The War Lover*.

⁶¹⁵ General Baron Antoine Henri de Jomini, b. 1779, was Chief of Staff to Napoleon Bonaparte's Marshal Ney and later military advisor to Russia.

⁶¹⁶ Machiavelli, *The Art of War*, Preface.

⁶¹⁷ Machiavelli, *The Prince*, Chapter XII.

world will be despised and trampled under foot when they are not supported, as they ought to be, by a military power; they are like a magnificent, roofless palace which, though full of jewels and costly furniture, must soon molder into ruin since it has nothing but its splendor and riches to defend it from the ravages of the weather⁶¹⁸...[T]he foundation of states is a good military organization...without such...there can be neither good laws, nor anything else good.⁶¹⁹

The same point was made by Sidney in his *Discourses*, when he states that the best government is that which best prepares for war, for no matter the form of government, all states have succeeded or failed, thrived or withered, as they were better or worse armed, disciplined, and commanded.⁶²⁰ Although this is a restatement of what we have already deduced, namely the symbiosis of stable government, successful economics, and military strength, Sydney's perspective is so incisive that his words are worth revisiting:

...that government is evidently the best, which, not relying upon what it does at first enjoy, seeks to increase the number, strength, and *riches* of the people; and by the best discipline to bring the power so improved into such order as may be of most use to the public. *This comprehends all things conducing to the administration of justice, the preservation of domestic peace, and the increase of commerce...*All governments, whether monarchical or popular, absolute or limited, deserve praise or blame as they are well or ill constituted for making war; and the attainment of this end do entirely depend upon the qualifications of the commanders, and the strength, courage, number, affection, and temper of the people out of which the armies are drawn: those governments must necessarily be the best which take the best care that those armies may be well commanded: and so provide for the good of the people...[I]t cannot be denied that in both respects the part which relates to war is much better perform'd in popular governments than in monarchies.⁶²¹

If it be said that the wise father...endeavors to secure his patrimony by law, not by force, I answer, that all defense terminates in force; and if a private man does not prepare to defend his estate with his own force, 'tis because he lives under the protection of the law, and expects the force of the magistrate should be a security to him. But Kingdoms and Commonwealths acknowledging no superior...[which] neglect the means of their own preservation, are ever left to perish in shame...This does not less concern monarchies than commonwealths, nor the absolute less than the mixed: all of them have been prosperous or miserable, glorious or contemptible, as they were better or worse arm'd, disciplin'd, or conducted.

⁶¹⁸ Machiavelli, *The Art of War*, Preface.

⁶¹⁹ Machiavelli, *Discourses*, Book III, Chapter XXXI.

⁶²⁰ Sydney, *Discourses Concerning Government*, Chapter II, Section XXIII.

⁶²¹ Sydney, *Discourses Concerning Government*, Chapter II, Section XXIII.

THAT THE BEST NATION IS THAT WHICH BEST PREPARES FOR WAR

As we already noted, Maine said:

The first necessity of a state is that it should be durable. In matters of government, all objects are in vain and all talents wasted, when they fail to secure national durability. One might as well eulogize a physician for the assiduity of his attendance and the scientific beauty of his treatment, when the patient has died under his care...Loss of territory, loss of authority, loss of general respect, loss of self-respect...are terrible evils, judged by the pains they inflict...and the government which fails to provide a sufficient supply of generals and statesmen, of soldiers and administrators, for the prevention and cure of these evils, is a government which has miscarried.⁶²²

Thus, whatever form of government or economic system a state adopts, its first responsibility is to be militarily durable, and success in this enterprise establishes the base upon which all other political, social, and cultural successes depend. Survivability is the very root of all national power and achievement. This idea is summed up by Sydney's timeless axiom that the best nation is, in effect, that which best prepares for war.⁶²³ Though many may say that the best nation is that in which the arts flourish most brilliantly, or in which justice most widely prevails, or even that whose populace is the wealthiest, these are all but results of the same characteristic, the ultra-important trait, the paramount accomplishment of all, national durability. To be durable requires peace and security; these in turn require preparation for war. A nation cannot properly prepare for war unless it adopts the most suitable economy and constitution for the purpose of defense. It must therefore acquire an harmonic constitutional government, a federal structure, a capitalist economy, and a fair and equitable justice system. From this, all benefits will flow. Thus, it is true that the best nation is that which best prepares for war, since this nation alone will be the most durable—it will have united power with politeness, justice with strength.

Respondent insists that consistency with our earlier praise of Plato requires us to deny that the best state is best prepared for war since Plato contradicts us in the *Laws*. Respondent implores that they are not motivated to make this objection by misguided pacifism or ignorance, but rather 'a growing respect for the writings of Socrates and the political ideologies of Plato.' We are unconcerned, however, with Respondent's professed motives for making their objection, and our reverence for Plato compels us to set aside our doubts concerning the good faith of Respondent's criticism. Plato's opinions carry with them a heavy presumption of correctness which compels us to weigh them with extreme care. We will therefore review his opinions regarding states which prepare well for war, whereupon we may determine whether it supports or refutes our contention that the militarily prepared state is indeed the best.

⁶²² Maine, *Popular Government*, Essay II.

⁶²³ Sydney, *Discourses Concerning Government*, Chapter II, Section XXIII.

As Respondent has discovered in the *Laws*, Plato writes of an Athenian who listens to, and finally corrects, a Cretan's explanation of the purposes of civil laws and institutions. The Cretan suggests that laws and institutions ought to be constructed such that they are best adapted for war,⁶²⁴ which is not far from what we have held in this case. The Cretan also insists that all states are naturally and perpetually engaged in a mutual, informal war, and that without victory in war, nothing else, whether possession or institution, is of the least value, since the goods and institutions of the vanquished go to the victors. We have come to nearly the same conclusion. The Cretan concludes by summarizing that the well-constituted state must be structured so as to be victorious over all other states. The Athenian character in the dialog, which Respondent believes to represent Plato's own opinion, then attacks and refutes these positions taken by the Cretan. This refutation is accomplished by taking note of the fact that a divided family is best governed so as to bring about not the destruction of the belligerent members, but rather their rehabilitation and conversion into productive, cooperative, and friendly participants in the group. By analogy, therefore, the state ought to be governed such that belligerent states are not destroyed, but rather rehabilitated and transformed into cooperative members of the family of nations. In Plato's words:

[T]he highest good, however, is neither war nor civil strife—which things we should pray rather to be saved from, but peace one with another and friendly feeling...With regard to the well-being of a state or an individual...a man will never make a genuine statesman who pays attention primarily and solely to the needs of foreign warfare, nor will he make a good lawgiver unless he designs his war legislation for peace rather than his peace legislation for war.⁶²⁵

Although Plato appears to refute what we have hitherto announced and defended throughout this opinion, he has in fact restated (or more accurately, pre-stated) our thesis, which was only that a state's aim is peace, not war, and that the only reliable path thereto is a thorough preparation for war. This is designing war legislation for peace. Plato paints nations as a family, within which fratricide is unacceptable. We say that the only formula for this is the federal harmonic constitution. Never did we advocate undertaking aggressive armed conflict. We have only recognized the inevitability of conflict and the unshakable result: the absolute need to be ready for such contests. Nor have we confined our attention to foreign warfare; internal faction and domestic conflict, under the name of tyranny and revolution, have been objects of our tireless concern. In the final analysis, we have stated that the best state is that which best prepares for *Peace*. Since this formulation, however, fails to indicate the method whereby peace can reliably be guaranteed, the alternate formulation, meaning the same thing, is much more useful. The best nation is that which best prepares for war, for such nation is *thereby best prepared for peace*, which is the threshold objective for a just society. It is in this respect, and in this respect alone, that the best nation is that which best prepares for war.

⁶²⁴ Plato, *Laws*, 626E.

⁶²⁵ Plato, *Laws*, 628C-D

Upon closer inspection, Respondent will discover that Plato agrees with us. One cannot reasonably argue that Plato envisioned a world without warfare, or that he even advocated the assumption of such Panglossian peace. On the contrary, Plato recognized that conflict is inevitable among states, for in the *Republic*, he noted that when states introduce even basic comforts and luxuries, they inevitably make war upon another.⁶²⁶ It is probable that Plato did not believe such a luxurious community to be an ideal state. He rather has Socrates argue that the ideal state was devoid of luxuries and only condescended to discuss the state sickened with excesses in order to locate virtue and vice more reliably:

The true state I believe to be the one we have described—the healthy state, as it were. But if it is your pleasure that we contemplate also a fevered state, there is nothing to hinder...Perhaps it isn't such a bad suggestion either. For by observation of such a city it may be we could discern the origin of justice and injustice in states.⁶²⁷

Nevertheless, he conceded that the obese, fevered state was, in fact, the one which human nature was disposed to create. “For there are some, it appears, who will not be contented with this [pure and simple] sort of life.”⁶²⁸ Moreover, the bloated state is that which must be considered when dealing with the practical establishment of a good constitution, good institutions, and just laws.

Respondent alleges that it cited the *Laws*, but we defended our opinion by citing the *Republic*, and that whenever we seem to encounter opposition to our theorems in one of Plato's imaginary states, we invariably flee to another in order to find the confirmations we seek. We are not, however, simply fishing for support from any old quarter. It is a blessing in disguise that Plato's Empire contains three cities. We may argue about which of these is the capital, which is the Sodom or Gomorrah. The ideal city, the diseased city, and the city of laws each present a different neighborhood of Platonic political theory, and the fact that an item may exist in one but not another is far from inconsistency, but an essential and intentional distinction regarding both the city in question and the thing.

Respondent suggests that Plato's analogy between the family and the state is false, and that one may thereby escape the application of family leadership, wherein members must not be destroyed but rather rehabilitated, to states. If we have understood Respondent correctly, we are willing to respond, even in the name of devil's advocacy, that this cannot be done. Plato connects the state and the family by inviting the Cretan to concede that the mutual war among states obtained as well among families and among all persons whatever. This concession is made. On the basis of that analogy, Plato has no trouble assigning the characteristics of good government from the one to the other. One could easily revisit and defeat this concession made by the Cretan, for clearly a mutual war among all persons is impossible. As we said above, there never was such a Hobbesian state of nature; there never was a war of all against all, for there will naturally exist selfish cooperation, terminating by necessity any possibility of perfect mutual conflict.

⁶²⁶ Plato, *Republic*, 372 E.

⁶²⁷ Plato, *Republic*, 372E-373A.

⁶²⁸ Plato, *Republic*, 373A.

But such a line of argument at last gets us nowhere, since Plato's analogy between family management and statecraft holds even if the Cretan's concession is false, that is to say, even if all individuals are not naturally involved in a mutual war. This much is clear from the fractal ideal of all political associations, and from Plato's own remarks, for in the *Republic* he establishes what he explicitly calls the ideal city upon the natural phenomenon of individual cooperation, not conflict. It is not even the avoidance of conflict that compels this cooperation, as it was for Hobbes. Rather, it was the fact that naturally, "we do not severally suffice for our own needs."⁶²⁹ The contention that Plato believes the social contract to be predicated upon cooperation rather than natural belligerence is further strengthened by the fact that it is articulated by Socrates in direct response to the competitively derived social contract advanced by Glaucon at 358E. So, Plato clearly recognized that conflict is inevitable among states, although he does not always assert that such conflict pervades or ought to pervade the interrelations of individuals. This assertion by the Cretan is therefore irrelevant.

Respondent now withdraws objection to our point that 'the best state is that which best prepares for war,' since it no longer believes Plato contradicted that maxim. In addition to our reasoning, Respondent cites the work of Craig, who says:

Perhaps one of the stranger things about Plato's [Republic] is its subtle preoccupation with war. Suitably distilled...his "Republic", [in] both the substance of the discussion and the form of the regime depicted therein, reveals itself to be recurrently if not constantly attentive to war...[T]he curious identification of philosophy and warfare continues to the very end of the discussion...⁶³⁰

We agree with Craig in this assessment, particularly insofar as Plato says that the leaders, or *Guardians*, "are athletes in the greatest of contests...athletes of war..." and that education must in no small part be a "training for war."⁶³¹ Their houses should be "the houses of soldiers, not of money-makers."⁶³² Also, for the young men who may become leaders, those "who excel in war and other pursuits...must [be given] honor and prizes..."⁶³³ This is all required because the city which boasts more than the mere necessities of life "must cut out a portion of [its] neighbor's land...to have enough for pasture and plowing...[It] shall go to war...We must ...enlarge our city...by a whole army, that will march out and fight our assailants in defense of all our wealth and the luxuries..."⁶³⁴ In these parts and so many others, as Craig has pointed out, Plato agrees that the best city is that which best prepares for war. If anyone rebuts this by asserting that such is only the case for the fevered city, we might remind that the best preparation is to eliminate the possibility altogether, which is done in Plato's city of necessity. Thus, we are in agreement with Respondent and we will certainly allow them to retract their objections to the maxim that the best state is that which best prepares for war, at no prejudice to their case.

⁶²⁹ Plato, *Republic*, 369 C.

⁶³⁰ Craig, *The War Lover*, Chapter I.

⁶³¹ Plato, *Republic*, 403 E.

⁶³² Plato, *Republic*, 416 A.

⁶³³ Plato, *Republic*, 460 B.

⁶³⁴ Plato, *Republic*, 373 E.

THAT WAR IS THE CENTRAL CAUSE OF CONSTITUTIONAL CHANGE

The primary cause of constitutional change is war. Therefore, the study of military matters should be part and parcel of any responsible inquiry into constitutional and political theory. A mere glance at the United States Constitution and its amendments makes its overwhelmingly militaristic origin evident. Consider the seven original Articles and the first ten Amendments of the constitution. These were the immediate product of the Revolutionary war and Shay's Rebellion. Taken together, they comprise a massive constitutional change catalyzed by war. The Thirteenth, Fourteenth, Fifteenth and Twenty-Fourth Amendments are the political consolidation of the military outcome of the American Civil War. Their jurisprudential essence was elucidated and expanded mainly during the Cold War and Vietnam. The Twenty-second amendment was fashioned to avoid recurrences of the massive Presidential power exercised during Roosevelt's three Presidential terms during and leading up to the Second World War. If one goes beyond constitutional provisions and inquires into the origin of statutes as well, it is no less strewn with baptisms of fire, for example the War Powers Act, which circumscribes the President's ability to command the Armed Forces with impunity. This military connection to the process of constitutional change must be noted, for there remain many who believe law and justice can be studied without an understanding of military matters. They are manifestly wrong, as the military origins of so many articles, amendments and statutes shows.

THAT PACIFISM AND NEUTRALITY REQUIRE NO LESS MILITARY STRENGTH THAN AGGRESSIVE WAR POLICY

Respondent contends that a nation might avoid the military necessities we have described if it is genuinely interested in pacifism and neutrality. We disagree, since rights of any sort are respected only when they are defended by an adequate military; and a nation despicable by its weakness forfeits even the privilege of being neutral.⁶³⁵ Military impotence invites insult of every description, and the state which lacks war materials sufficient to render both its friendship desirable and its displeasure fearsome, must by necessity suffer itself to be the victim, stooge, or dupe of those nations which field armies. By permitting such physical weakness, any state, however wealthy, enlightened and benevolent it may be, allows other nations virtually to dictate the conditions of its own political existence. Justice cannot last in such a nation, for when national military strength shrinks to insignificance, a nation's commercial and political interests are exposed to the wanton intermeddlings of other states. These nations, being intermittently thrown into conflict with one another, will have nothing to fear from such a puny state and accordingly will supply their needs by depredations upon its property and debauchment of its interests as often as either fall in their way.⁶³⁶ In *The Federalist*, Hamilton emphasized the national dilemma presented by military weakness with keen realism, noting that the dissolution of military power and

⁶³⁵ Paraphrase, Hamilton, *The Federalist on the New Constitution*, No. 11.

⁶³⁶ Paraphrase, Hamilton, *The Federalist on the New Constitution*, No. 11.

the economic base which supports it, gives rise to delicate questions concerning rights of every description, which more powerful states will hardly fail to solve to their own advantage.

Many are those who advocate a national power based on wealth and refinement alone, free from the fetters and costs of military instrumentalities. We must note, however, that this is ultimately a bankrupt suggestion. The wealth of a nation will avail it nothing without protection by military forces in a state of readiness; without such forces, the very wealth which seems so productive of national power is actually a tremendous source of weakness, an incitement to attack, a standing invitation to plunder.

THAT STANDING ARMIES ARE INDISPUTABLY NECESSITY TO PEACE AND STABILITY, THOUGH THEY INTRODUCE AN ELEMENT OF RISK

Petitioner has alleged the injustice of Respondent's vast 'peacetime' military force, a standing army with more destructive power than any known to human history. Petitioner claims that a standing army is the superfluity of a war-hungry state and forms an insuperable impediment to justice. We disagree, for the following reasons.

The decisive importance of mobilization to modern military success in both defensive and offensive operations forces us to concede that standing armies are critically necessary whenever an antagonist maintains like forces, lest the contest be a predestined defeat for the unprotected. The rapid seizure of strategic geography and industry, coupled with the swift destruction of defensive capabilities afforded by a peacetime standing army makes their existence in any country require their maintenance in every country. Peacetime standing armies are critical not only for the deterrence of aggression, but for avoiding summary defeat and enslavement when war breaks out. No wars have started but out of peace, and only a standing army can absorb the initial shock of violent attack, announced or otherwise. And only if this initial shock can be successfully withstood can the resources and organization of the state be brought fully to bear upon the military exigency. This may not have been the case in the age of the short-carry weapon, when wars were fought at close range, armies moved on foot or horseback, and technologies changed little during a lifetime. Under such technological circumstances, it was still conceivable that troops could be raised and trained up to the state of the art in time to repel a pending invasion. This is no longer the case. Petitioner's is an era of complex and constantly evolving strategic weapons, instantly reaching any quarter of the globe, of mechanized tactical forces capable of rapid movement. Such forces can win or lose a war on the first afternoon of hostilities; any belligerent without a standing army will be on that day destroyed. Moreover, technical and professional readiness now require a standing army, in order to allow for the honing of skills and perfection of new military equipment. The presence of a peacetime army thus wards off at once the obsolescence and incompetence which together are the natural afflictions of an unattended military. For these reasons, to disdain a standing army is to willingly become prey to the first invader.

The dramatic importance of mobilization which modern military technology im-

poses on international politics was early noted by Obruchev, a Russian negotiator in the late Nineteenth Century, who stated that “the undertaking of mobilization can no longer be considered as a peaceful act; on the contrary, it represents the most decisive act of war.”⁶³⁷ Kissinger summarized the point more precisely; What matters is who mobilizes first, not who fires the first shot. He described the political ramifications of modern military mobilization by explaining that modern weaponry and strategic plans rendered the mere mobilization of one’s forces nearly equivalent to victory if not met by an immediate counter-mobilization.

The side that procrastinated in mobilizing would lose the benefit of its alliances and enable its enemy to defeat each adversary in turn. The need for all the allies to mobilize simultaneously had become so urgent...that it became the keystone of solemn diplomatic engagements...If one side stopped [mobilizing] while the other proceeded, it would be at a growing disadvantage with every passing day.⁶³⁸

This facet of modern military planning makes a standing army absolutely necessary. But there is yet another factor which mandates a standing force, namely, the enormous value of surprise in military operations. This value was long ago recognized by the Taoist military philosopher Sun Tsu, who noted that, “rapidity is the essence of war; take advantage of the enemy’s unreadiness, make your way by unexpected routes, and attack unguarded spots...appear at points which the enemy must hasten to defend, march swiftly to places you are not expected.”⁶³⁹ This concept of surprise was incorporated in Liddell-Hart’s philosophy of the indirect approach, which merits the closest study by all would-be leaders. From it, we must note that the essence of successful national preservation requires a standing army capable of meeting the challenges posed by modern mobilization speeds and the timeless techniques of military surprise. Thus it is clear that standing armies are indisputably necessary to peace and stability, though they introduce an element of risk.

THAT THE IDEAL STANDING ARMY MUST BE MILITARY VIRILE AND POLITICALLY STERILE

Liberty cannot be preserved without an adequate national defense, and such a defense virtually requires a standing army. This seems hardly to be a contentious point, but the American founding fathers repeatedly addressed the dangers associated with standing armies, and the absolute necessity of adequately large standing armies exacerbates these risks. There can be no denying that a standing army poses a threat to the liberty it affords. The question becomes, then, how to provide for a standing army that adequately insures the national defense but poses the least possible threat to liberty and justice. The answer lies in crafting an army which possesses military virility and

⁶³⁷ Kissinger, *Diplomacy*, Chapter VIII. (Quoting from Obruchev memorandum to Giers, May 7/19, 1892, in Kennan, *The Fateful Alliance, France, Russia and the Coming of the First World War*, Appendix II.)

⁶³⁸ Kissinger, *Diplomacy*, Chapter VIII.

⁶³⁹ Sun Tsu, *The Art of War*

political sterility. Raw coercive force is only rendered politically sterile by an overbalancing, offsetting force. It is therefore clear that the military power must be separated from and counterbalanced by the entirety of alternate political force available in a state. The whole powers of legislation and adjudication must be jealously denied to the military forces, and the executive powers must be placed in their hands only under explicit and limited circumstances, all the while overseen and controlled by elements of the non-military government and the power of the people. The effective use of the military requires a chain of command terminating in a single officer of the government. In the United States, this officer is the Chief Executive. In order to insure that the chief executive is unable to turn the military power at his disposal against the legislative, judiciary, and remaining executive machinery of government, or against the people, pains must be taken to eliminate the leverage which the military might use in such an undertaking. This leverage is of two types, financial and personal. The military must be denied the ability to generate income or spend its own revenues at will. Both abilities afford too great an opportunity for coercion of both the non-military officials and soldiers in projects subversive to civilian rule by properly constituted authorities. Roman generals were able to collect funds through conquest and disburse these among their troops, thereby transforming patriotic soldiers into crass political partisans. Rome tried but failed to minimize this danger by placing the contract power of the state in the hands of the Censors, beyond the reach of the Consuls commanding the armies. In recent times, a military industrial complex has arisen from the thousands of businesses which rely on military contracts for their prosperity. Such spending power, when placed in the unrestrained hands of the military, would enable the standing army to dictate economic conditions and surreptitiously enforce a political agenda.

Regarding personal forms of coercion, the officers of the military must be denied the prospects of converting military experience into political capital, and the political leaders must be foreclosed from military command. It would be the wisest policy to forbid the Presidency, the Speakership of a legislative branch, any legislative seat, Supreme Court Justiceship or Governorship, to any military General, or any officer who has commanded more than one-twentieth of a nation's combined military personnel, or five-thousand men, whichever is smaller, or exercised any substantial influence upon the logistical circumstances of the same numbers. Such a policy would dispel any ideas a General might entertain of using the military forces at his disposal to secure for himself or another high-ranking military officer a legitimate control over the lawmaking, executive or judicial power of the state. Thus would a military career essentially result in political sterility for those who reached dangerously influential levels of military leadership. Moreover, a political career in high office should also foreclose a military career. Such a policy should be carried out at both the federal governmental levels and the member state government levels, such that portions of the federation do not fall under the poisonous control of military coercion. The industrial and geographical uniqueness of certain states makes this peril far greater on the state level than the national level. In fact, a national political power could be extorted by influential military leaders who, being barred from federal governmental service, successfully captured state government posts in vital strategic or industrial states.

A further method whereby the latent danger of a standing army may be reduced is by insisting that the army be composed of the people, the citizenry. In this way, the power of the army will be handicapped by a reluctant soldiery if it moves against the

government and especially if against the democratic element of the constitution. And yet, this is one of those happy reforms which renders the army relatively more powerful in all other respects, for the citizen army is the most reliable, pliant and tenacious of all fighting forces. As Machiavelli clarified, the mercenary force is nearly useless by comparison, for it has no stomach for stanch fighting and invites defeat by its very presence on the battlefield. Moreover, when mercenaries win, they are usually in a position to dictate terms not only to the losers, but to their erstwhile employers as well, who in victory find themselves in as sorry a crisis as the vanquished foe.⁶⁴⁰

Yet another method of securing society against the dangers of a standing army is to apply the principle of the separation of powers to the military.⁶⁴¹ In times of peace, the military may be subdivided into services or branches, each with its own sphere of responsibility and interest, such that each service has an area of exclusive authority, and yet each is nevertheless unable to do its job properly without the assistance of the others. This means that no branch is without some exclusive area of authority, and no branch is entirely self-sufficient and autonomous in a military sense. Although in times of war, such an arrangement is an embarrassment to coordinated and cooperative management of campaigns, in peacetime it serves the dual function of enhancing specialization and promoting inter-branch competition over resources, funding, and responsibilities. It becomes, therefore, less likely that any one service could attempt to interfere with the civilian government, for without the remaining services, it could do but an incomplete job, and being in competition with those services, it would not expect their cooperation, but rather their positive resistance, as they would benefit materially from its diminution in terms of money and authority. Thus, each service stands as a deterrent to the depredations of the others, and to the extent that competition is engendered among them, they will innovate and excel to the general benefit of the whole society.

Now, the era of atomic weaponry presents to this scheme a wrinkle which must be considered. Only the possession by each service of atomic weapons or similar weapons of mass destruction, and a second-strike capability, can insure that a stable deterrent and credible competition will arise among them, for if one service is unilaterally able to destroy the others with impunity, there will be no real competition or deterrence among them. Thus, the doctrines of mutual assured destruction and guaranteed second-strike apply to the various services in an intentionally divided military. It must be finally emphasized that all of these divisions within the standing forces are peacetime artifices which in time of declared war must be immediately curtailed in order to optimize military posture for victory over adversaries.

Standing armies pose another threat to the mixed constitution which must be noted and provided against: they tempt the executives to adopt belligerent policies in order to maximize their influence. In the mixed constitution, the executive has at his disposal the military power of the state, which is constitutionally to be employed only at the will of the legislature. However, since the executive is denied legislative and adjudicative powers, it has relatively little decision-making authority outside of its military responsibilities. It therefore is tempted to pursue military solutions to as many problems as possible in order to maximize its power and influence. The oft as-

⁶⁴⁰ Machiavelli, *Discourses*, Book II, Chapter XX.

⁶⁴¹ We remain reluctant to state, however, that the Army is actually the executive, the navy, the legislative, and the air force, the judicial power.

serted belligerence of the United States is far more likely to be the result of this phenomenon than any predisposition to violence or militarism.⁶⁴² This tendency is a natural product of the separation of powers and thus must be guarded against. The best solution is to afford the legislature the power of disbanding part or all of the standing army at its own will, notwithstanding the wishes of the executive. This will check the natural impulse of the executive power to use its military power to accomplish what it constitutionally cannot do by legislation and adjudication.

THAT NO CONSTITUTION IS INHERENTLY PEACE-LOVING, THOUGH SOME ARE MORE PEACEFUL THAN OTHERS

The phenomenon of executive belligerence in the mixed constitution accords with the realization that no form of constitution is inherently peace-loving, though some are more disposed towards peaceful policies than others. We have already seen that democratic states are not always gentle and have even waged war upon one another in some cases. They may be less inclined to war than despotisms, but these, being governed by the will of a single person, are quicker and more impulsive in all acts, not only war. If a despotism is lead by a peace-lover and a democracy filled with bloodthirsty mobs, indeed the democracy will be the more belligerent of the two. The ancient barbarians of Germany, the *Suevi*, *Tencteri*, *Usipetes*, and later the *Alemanni*, *Franks*, *Saxons*, and *Goths*, were reputed to be democratic lovers of freedom, and whether such is true or not, they were among the most warlike peoples known to the Roman Empire, a state less belligerent than its republican predecessor. Indeed, Rome itself provides the ultimate example of a constitution which was inherently belligerent when mixed yet somewhat reticent when plunged into imperial tyranny.

The Roman constitution under the Republic was built for war; it ran by war. Although such was unintentional, war made its checks and balances function. Machiavelli notes that Rome's strength and liberty derived from the friction between the nobles and the people. But he failed to note that war itself was the glue which made these incompatible parts cohere and cooperate in the midst of their tumults. A brief review of the Republican constitution shows why this unexpected result was the case.

In 509 B.C. the people of Rome, led by the Patricians, overthrew the hated Tyrant Tarquinius, ending two-hundred and forty-two years of Roman mixed monarchy. The King was replaced by two annually elected Consuls. These commanded the armies with impunity so long as outside the walls of Rome, and they could collapse the whole power of the state into the hands of a Dictator for limited times and objectives, a power reserved for catastrophic emergencies. On very rare occasions, however, a popular vote created a dictator. The Senate's power and membership were increased, and it gained a de-fact control over religious matters, since it was dominated by Patricians, to whom religious matters were traditionally entrusted. The Senate also assumed the powers of spending, later given to the censors, and of allowing or refusing a triumphal parade for a Consul's victorious military campaign. Soon thereafter, independent Tribunes of the People were established as magistrates to represent the interests of the people. Each of the ten Tribunes had complete legal immunity and held an absolute veto over any action of the Senate. In addition, they could accuse and

⁶⁴² Hinted at by Eagles and Johnston, *Politics*, Part IV, Chapter IX..

try anyone but a sitting dictator of crimes against the people, and they could hear appeals of anyone convicted of anything, so long as within one mile of Rome. Finally, the people, voting in groups of one-hundred, held the power to declare war. Thus three elements competed in the new Republic, the Consuls, the Patricians with their Senate, and the People with their Tribunes. The resulting standoff between Consul, Senator, and Tribune became an indelible feature of the Republic and gave it its unique impetus towards military activity, as illustrated by the following example.⁶⁴³

Rome would hear of a neighboring army's approach. As no standing army existed, levies would be drawn from the people for the upcoming fight. While hostilities lasted, the remaining citizens were without men of military age, these being all under arms and away from the city. The Senate could then gain the passage laws more favorable to itself and the patricians without fear of rioting and popular resistance. Moreover, the Consuls had absolute authority over the soldiers while they were in the field, and consequently any voting taking place during times of active campaigning could be skewed by the power of the Consuls over the voting soldiers. The Senate looked forward to victory in the field because a conquest would result in seizure of foreign territory and property, which it could distribute largely to itself, the people being mainly away on military duty and unable to oppose the deliberations of the Senate.

But such tricks were known to the people and their Tribunes, who would foment a riot whenever the Senate called for a general levy to form an army. The Tribunes would accuse the Senate of fabricating a war scare, deny that any army was threatening Rome, and accuse the Senate of either a desire to pass damaging legislation in the absence of the army, or an ambition to seize foreign territory for their own profit using the blood of the people, or both. The angry mob, protected by the Tribunes, would refuse to enroll in the army, and for the moment Rome would be defenseless. The Tribunes could then extort demands from the Senate in exchange for permitting the Senate to hold the levy and enroll an Army. These demands often included relief for debtors, deferral of some piece of obnoxious legislation, plebeian access to some formerly patrician office, and arrangements for the soldiers to receive certain portions of realty and personalty seized during the campaign. The Senate would have to yield to some of these demands in order both to preserve the state from the approaching enemy and enrich itself with war booty. Moreover, the Consuls could enjoy no military fame or command without the Senate yielding to the People; The Consuls depended, however, on the pleasure of the Senate to grant them the coveted honor of a Triumph if they returned victorious, so they could not press the Senate to yield to popular demands too vociferously. Of course, if the emergency became acute, the Consuls could appoint a dictator and diffuse the entire situation, but they would lose their priceless chance to command the army, and the people would not easily forgive the maneuver once the danger was dispelled. Therefore, the appointment of a dictator usually came with a high political price and was consequently undertaken only in moments of extreme panic.

In this manner, the Senate, the Consuls, and the People understood that each truly had power over the others only in time of war, and a military campaign, whatever its motive, was sure to result not only in a certain political equality but also a nearly universal enrichment. Thus, war drove the constitution and made it operate. The checks and balances only worked in times of war, and the interests of each constitutional

⁶⁴³ Lintott, *The Constitution of the Roman Republic*, Chapter VII, Subchapter III.

element were maximized by it. Of course, such a system can only work if the wars end in victory, and this depends on the composition and leadership of the army. The Roman army and its leadership was markedly better than Rome's many enemies, and this is why the habit of victory could so reliably support each group's belief that only by war could it maintain its liberty and maximize its wealth.

Thus it is clear that some constitutions are intrinsically militaristic, while others are more peaceable. Rome provides an example of a system which, although influenced to a great degree by the popular element, nevertheless maintained a warlike temperament by its very structure.

THAT DEMOCRATIC SYSTEMS ARE LIKELIER TO WIN AS WARS LAST LONGER.

Democratic states experience more immediate pressure from the popular element during wars and hence react more passionately to victories and defeats. For this reason, they are often considered unstable in war and ever likelier to capitulate as a war wears on. But this is only true to the extent that they are losing a war. This defect is more than offset, however, by the positive military advantage democratic states enjoy in their economic prowess. Their innovating, financing, designing, and manufacturing of weaponry will eventually outstrip tyrannical opponents, and thus the passage of time turns the tide of war ever in their favor, other things being equal. If their forces at the earlier stages of the war can sustain the shock of attack and preserve the physical integrity of the state long enough for economic forces to become decisive, the democratic systems will be likelier to win as the war lasts.

THAT JUSTICE REQUIRES A CONSTITUTIONAL FORMAT WHICH AUTOMATICALLY GENERATES ENLIGHTENED MILITARY LEADERSHIP AND GENERAL CREATIVITY.

Without skillful generalship even the most just nation will eventually perish. But true military geniuses arise randomly and rarely, and a wise nation cannot sincerely expect that one will be on hand when needed. This is why the perfect constitution must automatically foster enlightened military leadership, in addition to all the other things we have said about it. Fortunately, the Harmonic Federal Constitution naturally generates enlightened military leadership. This tendency arises from two causes: first, the safeguards of the democratic element promote intellectual freedom and creativity. Second, capitalism and mass political participation together promote competitive incentives and competitive experience. These harmonic conditions incubate the type of mind and character most suitable to excellence in military leadership. The harmonic constitution therefore systematically tends to foster excellent leaders, and fields, on the average, better commanders than non-harmonic states. This is most plainly seen by comparing the average leadership in the more harmonic states compared to that in monolithic states, even when the latter are highly militaristic.

Militaristic states usually foster a warrior caste and a leadership caste, thus violating the essential harmonic requirement that there be no differing political classes. They also rely heavily on indoctrination and austerity, which impairs the democratic

element's ability to exercise consent and self-government. The result is well-disciplined armies with poor leaders. Thus, in the name of military expediency, militaristic states create a system which in reality retards the tendency for enlightened leaders to emerge.

Wars are won by wits. The clever defeat the ignorant. Other factors, like material strength, also play a role, but these, too, are the rewards of cleverness. Therefore, the system which creates clever and wise people will generally outperform those which create ferocious and loyal automatons. A good example of this is the clash between the United States and Japan in World War II. Japan was a militaristic oligarchy which, as we have seen, had eliminated the efficacy of its democratic element through severe educational and cultural strictures, including religious and cultural ideologies requiring unquestioning obedience. The resulting Japanese military was unsurpassingly tenacious and loyal. Its leadership, on the other hand, was heartbreakingly poor. The American forces, by contrast, were composed of moderately well-educated citizens, most of which enjoyed equal rights and capitalism. They were exceedingly creative and flexible, but not so obedient as their Japanese adversaries. Refusal to obey a foolish order was not unheard of in the American forces but was practically unthinkable among the Japanese. The results were predictable. The militarists succeeded at first, since their massive dogmatic planning and meticulous execution were pitted against comparatively little American planning. But when both forces were equally involved, the Japanese lost owing to poor strategic and tactical plans, even when enjoying material superiority. In the fluid situation, they could not compete.

The Tenaru river battle during the Guadalcanal campaign illustrates this phenomenon. This doomed attack exemplifies the poor leadership which plagued Japanese military at all levels during the war. After naval defeat off Savo Island, the Americans abandoned their Marines on Guadalcanal to defend themselves against attack by more numerous Japanese forces. The Japanese attacked across Tenaru River but were disastrously defeated. The reasons were simple. First, the Japanese underestimated the number of American defenders by half, and then attacked before even half their own troops had arrived. They therefore found themselves badly outnumbered. Expecting the American troops to be pushovers, they attacked across a river, uphill, into the teeth of an entrenched and heavily armed enemy; and fifth, they attacked using ancient swords and bayonets in a mass charge against carefully prepared machine gun and rifle pits. The Japanese soldiers obeyed admirably but were completely slaughtered. They were lead by a fanatical zealot, Colonel Ichiki, a war-mongering hothead of little real-world knowledge. He was an agitator who had pushed Japan into war with China by provoking an incident with Chinese forces north of Korea, at the Marco Polo Bridge. This man was a product of the monolithic militaristic system, not an aberration.⁶⁴⁴

Sparta affords another intriguing example of anti-strategic tendencies arising from the lack of a harmonic constitution. Sparta's citizens possessed the vote and were raised under extreme equality and austerity. They were inured to absolute obedi-

⁶⁴⁴ Frank, *Guadalcanal: The Definitive Account of the Landmark Battle*, pp. 143 et seq.

ence. Their subordinates, however, the politically powerless *Perioikoi*, had no vote but could pursue business and enterprise freely, thereby stimulating and exercising their minds. The egalitarian and austere citizens of Sparta became famed as the most disciplined troops in Greece, but the best Spartan commanders always came from the *Perioikoi*. During the Peloponnesian war, three Spartan commanders emerged with true military talent. The first was Brasidas, the second, Gylippus, the third, Lysander. Together, they accounted for the defeat of the Athenian empire, and all three were from the *Perioikoi*.⁶⁴⁵ These peoples, who were politically dominated by the Spartans but permitted to pursue all other freedoms, were able to produce clever and creative thinkers. The Spartans were not. As the *Perioikoi* joined the Spartan forces as auxiliaries, these three men rose to the top and, in time, brought the otherwise abysmally lead Spartans to victory over Athens. Brasidas' successes in northern and central Greece bought Sparta an armistice which prevented her collapse by *Helot* rebellion. Gylippus' brilliant rescue of besieged Syracuse resulted in the complete annihilation of Athens' Sicilian fleet and army. Finally, Lysander's naval victory at Agostopotamai finished the war and produced the final surrender of Athens. Sparta won the Peloponnesian war because its creative element came to the top. Of course, it then lost the peace because it continued to hold these peoples down. Athens, on the other hand, lost the war because the counsels of its more numerous creative thinkers were often drowned out by demagoguery and mob rule inherent in its overly-democratic constitution. Thus, Spartan and Athenian history both exemplify the effects which constitutions have on a state's reservoir of military talent.

But wits win wars on the home front, too. A home front that stifles creativity is nearly as disastrous as an unenlightened leadership in the field. In 1930, most of the world's nuclear physicists were working in Germany. Einstein and Heisenberg, Bohr and Meitner, were available to help Germany invent the atomic bomb. But Germany under the Nazis had more than the traditional German aversion to heterodoxy; in it raged an apoplectic hatred of minorities, particularly the Jews. So, the Jewish scientists came to the United States, and the remaining scientists bungled the development of the atomic bomb through aversion to creativity and adhesion to hierarchy. Heisenberg was put in charge of the Nazi atomic bomb project. He perfunctorily rejected the advice of his juniors in constructing the bomb, and as a result, ignored their correct assertion that the ideal shape for maximizing a nuclear chain-reaction in solid uranium is the sphere. He also refused to pursue production of heavy water, 'deuterium,' in nearby areas, preferring to import it from occupied Norway. This halted his project when the Allies first sabotaged the factory and later sank its shipment of deuterium. In the end, his barbarous regime was defeated by conventional means before any atomic weaponry was developed.⁶⁴⁶ But in America, the German physicists found a land friendlier to heterodoxy and creativity. The successful completion of the Atomic bomb proceeded apace and was a result of America's systematic, even *constitutional*, permissiveness towards creativity. When the atomic bomb was used on Japan, the latter country again experienced the utterly tragic results of a system which stifles thinking.

⁶⁴⁵ Duruy, *History Of Greece, From The Earliest Times To The Roman Conquest*, Volume I, Section II, Chapter VII, Subchapter II.

⁶⁴⁶ Bodanis, *E=MC²: A Biography of the World's Most Famous Equation*. Part IV.

Europe has historically dominated Asiatic, African, and Middle-Eastern societies because of this constitutionally enhanced creativity. Over the long term, competitive systems always out-do obedient systems. Creative systems dominate orthodox systems. These axioms govern military conflict as well as other social interactions. Unify these maxims and one finds four possibilities: creative competitive systems, orthodox competitive systems, creative obedient systems, and orthodox obedient systems. An example of each: The United States, Germany, Ancient China and Soviet Russia. Capitalistic Republics tend towards creative competitive or at least orthodox competitive systems. Theocracies and tyrannies tend towards Orthodox obedient systems. Over the long term, the latter lose to the former. For instance, in the 20th century, Russia was beaten by Japan, which was in turn beaten by the United States, the more creative nation winning in each case. The role of creativity and energetic competitiveness always wins over time. In nearly every respect, wits win wars. That does not mean wits will win virtually every war. Wits being equal, weight can win. But over the long term, competitive creative systems always prevail.

This is also the reason why fundamentalism and zealotry fail over the long-term. Fanatics exert more energy in pursuit of their causes than all others. And yet they fail over time because the very inflexibility that buoys up their energies stifles their creativity. The fanatical lifestyle is not clever or thoughtful. It shuns intellectual honesty in favor of rote dogma, and this in order to be entirely executive. Thus, the unthinking system, whether shackled by political orthodoxy or mired in religious or other fanaticism, is always bested by creative and competitive systems.

Thus, we must keep in mind that justice requires creativity and the intellectual freedom of the individual, for without these, even the most just systems perish militarily. Nations must win the war of wits to survive, and only just nations can do this. All others will lack the atmosphere in which the necessary creativity flourishes.

THAT WAR IS CONSISTENT WITH NATURAL LAW

Petitioner claims that Respondent's recourse to war to solve political questions is intrinsically unjust according to natural law. Respondent answers that war is consistent with natural law, and that so long as one abides by the rules of war, it is never unjust. Since this controversy requires careful attention, let us note as a preliminary matter what war is. Then, let us answer the question as to whether it is ever naturally lawful to wage war, and if so, whether and what laws govern that enterprise. Cicero defined war as a contest by force, and Grotius refines this as a condition of forceful contention.⁶⁴⁷ Clausewitz, as usual, provides a more insightful and acute definition:

War therefore is an act of violence intended to compel our opponent to fulfill our will. Violence...is the *means*; the compulsory submission of the enemy to our will is the ultimate *object*... War is an act of violence pushed to its utmost bounds...The war of a community...always starts from a political condition, and is called forth by a political motive. Therefore, it is a political act...also a real political instrument, a continuation of political commerce, a carrying out of the same by other means.⁶⁴⁸

⁶⁴⁷ Grotius, *De Jure Belle et Pacis Libri Tres*, Book I, Chapter I, Section II, citing Cicero, *On Duties*, Book I, Chapter X, 34.

⁶⁴⁸ Clausewitz, *On War*, Chapter I, 2-7, & 23-24.

This being the definition of war, and war being repugnant and abominable to humanity generally, we may rightly ask whether war is consonant with natural law. There is little dispute that war is agreeable to the law of nature, though this may seem shocking at first. The hallmark of living beings is that they operate so as to preserve their own state of existence.⁶⁴⁹ Self-defense is thus allied to the most basic and universal principle of animal nature and is therefore consonant with natural law. Thus, insofar as war is self defensive, war perfectly accords with natural law.

Yet what of offensive war, whose immediate object is not the preservation, but rather the enhancement of a state? We have seen that life is a state of molecular elevation and instability which suffers constant deterioration.⁶⁵⁰ Any act which aims to merely preserve a deteriorating state of living will, by the operation of time, fail. The only way effectively to preserve a deteriorating state is to attempt to enhance it, such that the planned augmentation equals the expected deterioration. Thus, only an action which aims to enhance today's existence will effectively preserve tomorrow's. This being the case, it is clear that war which aims at enhancement is not necessarily adverse to natural law, since offensive war may be the only means of achieving mere preservation.

Thus, in the case of individuals contending with one another by force, offensive and defensive war is in perfect keeping with natural law. Grotius summarized it thus:

In the first principles of nature there is nothing which is opposed to war; rather, all points are in its favor. The end of war being the preservation of life and limb, and the keeping or acquiring of things useful to life, war is in perfect accord with those first principles of nature. If in order to achieve these ends it is necessary to use force, no inconsistency with the first principles of nature is involved, since nature has given to each animal strength sufficient for self-defense and self assistance.⁶⁵¹

Grotius assumed, without investigation, that this principle of individual natural law was applicable to nations as well as individuals; Yet, the fact that a nation is composed of individuals does not mean that it may behave as an individual, or that it must possess the qualities of its individuals. Some groups, in fact, possess qualities completely different from their members. For example, atoms of chalk are invisible, but a group of chalk atoms is visible. A group's characteristics may thus differ drastically from those of its members. With this in mind, it is not at all clear that what is a natural law for individuals is therefore a natural law for states. Perhaps, some individual right may be naturally exercised by the state, through agency, or by a group on behalf of another or others, but this must be established logically and not merely assumed.

The question thus becomes whether under natural law an individual or group may undertake war on behalf of another. We have already seen that individuals form societies in order to secure the various needs of mind and body, including safety from physical peril. In so uniting, they often relinquish certain natural rights in favor of the

⁶⁴⁹ *The Sophomoric Discourses*, Book III, Chapter I. "The universally constant feature of life is self-perpetuation."

⁶⁵⁰ *The Sophomoric Discourses*, Book III, Chapter 1.

⁶⁵¹ Grotius, *De Jure Belli et Pacis Libri Tres*, Book I, Chapter II, Section I, Part IV.

common government, such that it may function more smoothly and effectively. One of the rights typically sacrificed in exchange for the protections of society is the ability to pursue certain methods and degrees of self-defense. Individuals forswear self-help and personal violence and allow the state to undertake these duties instead, in order to secure a more perfect rule of law, for a society in which every person is alike an enforcer of the law quickly becomes one in which every person is a maker of their own law, and a sea of tyrants replaces the edifice of government. Having relinquished the practical ability to defend themselves in exchange for common provision of safety, these individuals are owed a duty of defense by the society. In such cases, the society must defend the individual members, by war on their behalf if necessary, or breach the social contract and authorize its own dissolution. In this context, making war on behalf of others is not merely permissible but obligatory.

In the cases where an individual retains the right to self-defense, may he, in conformity with natural law, ask or authorize another to undertake the burdens of this defense? We have assumed this much already in positing a social contract wherein individuals delegate defense duties to a group government. Moreover, insofar as the union of individuals into families, families into villages, and villages into states, and the division of labor inherent therein is natural, then delegation of self-defense is natural as well. Certainly, it is the very basis of humanity's natural social essence that the less martially fit place the duties of communal defense in the hands of the more fit. We must also nod to the fact that societies which fail to adopt this principle of organization are typically destroyed by those which do. Thus, we are arrived at an interesting answer to the question of whether individuals may delegate their self-defense. Under the law of nature, they must, or perish.

This answer moots the question as to whether individuals born into ongoing societies, who did not themselves consent to the social contract, may withhold delegation of the right to self-defense. Such would be a violation of natural law, for according to our prior reasoning, they have no choice but to delegate these abilities to the group. It may be punishable or otherwise, but such would be a question of a state's particular laws, not natural law. Were a refusal to delegate self-defense *not* a violation of natural law, we might then inquire as to whether the ancestral consent of their forefathers bound them to obey the laws of the community and delegate their powers of self-defense, or in the alternative, whether their own enjoyment of the social fruits of community during their youth bound them to obedience in their adulthood. However, neither of these questions must be reached, for natural law itself preempts them with the answer.

THAT THERE ARE PROPER LAWS OF WAR, THOUGH THESE ARE DESCRIPTIVE, NOT NORMATIVE

It being clear that war is consonant with natural law, let us inquire as to the existence of laws of war. War is a means required to bring about a desired political result, or as Clausewitz stated above, it is "an act of violence intended to compel our opponent to fulfill our will." Everything in war is related to the end which it seeks. As MacArthur said:

...once war is forced upon us, there is no other alternative but to apply every available means to bring it to a swift end. War's very object is

victory, not prolonged indecision. In war, there is no substitute for victory. Why, my soldiers asked me, surrender military advantages to an enemy in the field? I could not answer...⁶⁵²

Since war is only a means, the laws governing it are entirely and exclusively descriptive. Its morality depends entirely upon the moral nature of the result it attains. Acts committed during war violate the natural laws of war only if they fail to achieve the goals of the war. Crucially, it is the goal and result of the war which gives these acts their moral significance. If the result is the establishment of an immoral and unjust regime, or the advancement of political injustice, then such a war is by definition unjust, regardless of the relative forbearance and politeness with which it is waged. Even the gentlest acts of such a war are unjust. Conversely, if the result is the elimination of injustice, or the inauguration or preservation of a truly just regime, then such a war is just, potentially despite the violence and destructiveness which characterize it. If the violence is such that the end result is impaired or sacrificed however, and a just society in fact cannot arise or thrive, then *and only then* does the degree of violence itself become unjust.

Genocide, the slaughter of prisoners, rape, and other extremities of violence are intrinsically despicable for obvious reasons, but they are violations of the law of war only because they lack utility; they thwart the only valid objective of war, namely the establishment or preservation of a truly just regime. The peoples upon whom such extremities have been visited by a state will never be its willing citizens, nor will they be capable of contributing to it meaningfully. Thus, such acts of depravity, while intrinsically evil for other reasons, violate the natural law of war because of their extreme disutility. Were they ever to be, on the whole, useful, they would therefore not violate the natural laws of war, although they would still be immoral. Everything in war is related to the ends which it seeks. As a means, war is a science, and the laws governing it are entirely descriptive. The basic limitations upon the conduct of war are basically found in defenses which leave nothing to defend, conquests which make possession impossible, in means which swallow up the end. Hence, there can be no defense which leaves nothing to defend, no offense which leaves nothing to gain, and no force which produces no surplus of justice. In tyranny, there is *ab-initio* nothing to defend. The immoral nation has no moral defense; it is indefensible. And an immoral nation is a tyrannical nation. Thus, it is plain that tyranny defeases a nation of its right to defend itself or attack others. This is not surprising when we remember that tyranny, to the extent that it infects a state, destroys that state's right to exist at all.

This makes studying the laws of war strictly an investigation of military theory. Those who do not consider military theory will, accordingly, remain ignorant of the laws of war, and by extension, of the methods whereby a true system of justice can be established and must be maintained. We therefore hold for Respondent, that war is consistent with natural law and that if the laws of war are obeyed, war is never unjust. However, we caution Respondent not therefore to assume that its conduct towards Petitioner comported with the laws of war.

⁶⁵² MacArthur, Farewell Speech to Congress, April 19, 1951.

SECTION II: THE DESCRIPTIVE LAWS OF WAR

Respondent claims that the laws of war are unknowable, and thus we cannot say that Respondent failed to obey them. We disagree with this characterization of the laws of war. The principles of military victory are well known to those who have sought them. As a whole they are often termed the “art of war.” Napoleon aptly summarized the procedure whereby these laws may be discovered:

Make offensive war like Alexander, Hannibal, Caesar, Gustavus Adolphus, Prince Eugene and Frederick; read and read again the history of their eighty-eight campaigns; model yourself upon them—that is the only way to become a great captain and apprehend the secret of the art;...you must reject those maxims opposed to those of these great men...Understanding grand strategy cannot be learned but through experience and the study of the campaigns of all the great captains.

We must, of course, add Bonaparte’s name to his list. Learning the art of war is not a difficult task. To unfold the mysteries of these laws, one need not but analyze the movements and battles of a mere dozen human beings, men whose ingenious techniques produced successes out of all proportion to their means, and even more out of proportion to the meager gifts of luck and chance.

In the final analysis, all national power, all the polite accomplishments of art and culture, all the profits and all the produce of a people and their nation, will not yield military victory without enlightened generalship. The side which follows the great captain will prevail, set against him whatever obstacles you will. This is why the establishment of economic might alone is not enough to secure peace and justice. Political stability depends not only on constitutional form, not only on economic power, but finally and crucially upon talented military commanders. The nation’s constitution provides the legs of the army, its economy, the stomach. We are now looking at the brain. If this is deficient, the entire nation will be lost, whatever its qualities, whatever its size, whatever its wealth. Thus, such individuals, such great captains must be identified and provided to the state if the ideal system of justice is to be more than an ephemeral daydream. Certainly, in order to raise and promote such geniuses of war, leaders must be familiar enough with the descriptive laws of war to discover who they are. This makes a familiarity with the laws of war imperative for anyone who would design a state or manage the affairs of a nation, even though they personally aspire to no military position or undertaking. Not knowing these principles, a political leader will be unable to locate such captains when they are most needed, and his society will be destroyed by one led by people more familiar with the laws of war.

The method most perfectly suited to learning the laws of war is the case study method. This method avoids the mechanical teaching and regurgitation of maxims, and instead inculcates a latent understanding of these principles which are implicit in the various battles and campaigns. Only in such a way does one cultivate an understanding of the facts and circumstances which drive the maxims, and only through

such vicarious experience can one learn to notice, apply and even advantageously violate the maxims of war. Any fool can recognize a diamond when it is cut, polished, and put under the light, but it takes a trained eye to find a rough diamond in a heap of ore. The case of the military maxim is no different. Any fool can understand the maxim, few can notice the maxim lurking in the facts confronting him. It is to train in the sifting of such facts for the maxims that the case study is of such utility. The case study method is emphatically not supposed to render the discovery of military maxims somehow 'scientific,' as if an empirical analysis of a few campaigns could yield scientifically reliable answers. The task is not science, it is, rather a cultivation of military intuition. It is to enable the captain to see the primary syllogistic reality in the situation before him; the facts are his first premise, his goals, the conclusion. The case study method allows him to grasp intuitively the middle term of the syllogism, the maxims which lead from the facts to the desired outcome. Thus, careful study of the great captains will give the commander an ability to look into any situation and grasp the military middle term leading to his desired outcome.

To this method must be added the tutelage of practitioners familiar with the contemporary tools of war. This apprenticeship is important, as is a broad understanding of the social and political realities which underlie contemporary military issues. However, all is for naught without the primary ability to recognize the latent maxims of war in case after case.

We shall make no effort here to survey the various campaigns of the great captains and extract from them their timeless lessons. This all-important but fascinating task has already been done, and we recognize the work of T. Dodge and B. H. Liddell-Hart as highly persuasive, if not definitive in this area.⁶⁵³ And we cannot over-emphasize the value of the ancient as well as recent campaigns they recount and dissect. For as Hart reminds, "...[T]he art of generalship does not age."⁶⁵⁴ This remains true even in the era of nuclear weapons and other weapons of mass destruction, for proliferation of such weapons, as will be seen, does not prevent war, but merely shifts it into more subtle and less destructive forms, particularly in the case of civil wars.

THAT NUCLEAR WEAPONS LIMIT, BUT DO NOT NEGATE, THE TIMELESS MAXIMS OF MILITARY STRATEGY.

Respondent protests that such maxims of war are useless in the age of Nuclear weapons and that such outmoded military principles may be safely forgotten. Again, we disagree. The advent of nuclear weaponry effected a change in warfare which essentially reintroduced a long-lost and utterly terrifying aspect of war, namely that it could easily destroy all belligerents completely and permanently, winners and losers alike. There was, no doubt, a time when primitive sapiens could not make total war on each other lest the entire species be destroyed by the combined force of first the belligerents and then nature with her array of hostile creatures and climates. This time certainly lasted for eons, during which war was limited by the prospect of mutual as-

⁶⁵³ Theodore Ayrault Dodge, (1842-1909) Lt. Col., U.S. Army, and Sir Basil Henry Liddell-Hart, (1895-1970).

⁶⁵⁴ Liddell-Hart, *Scipio Africanus: Greater Than Napoleon*, Preface.

sured destruction of the entire species. This possibility disappeared as homo-sapiens gained an undisputed control over the threatening forces of nature and the other animals of the earth. Thereafter, for a brief time in the species' history, no war, however total or brutal, could result in the extermination of the species. The species was too populous, too widespread, and too resilient to be completely exterminated by total war against itself. This brief time, a product of technical development, ended in the twentieth century A.D., when nuclear weapons, yet another technical development, returned things to their primordial state. As it was in the beginning, mankind now cannot wage total war against himself or he will be completely and permanently destroyed. This does not mean the end of war. It merely means the unlikelihood of total war. As it was in the beginning, war is now limited to means and ends which fall short of total destruction, and this by the selfish concurrence of all belligerents. In such war, the traditional art of war plays an enormous role, as Liddell-Hart noted:

The common assumption that atomic power has canceled out strategy is ill-founded and misleading. By carrying destructiveness to a "suicidal" extreme, atomic power is stimulating and accelerating a reversion to the indirect methods that are the essence of strategy—since they endow warfare with intelligent properties that raise it above the brute application of force...Now the atomic deterrent to direct action on familiar lines is tending to foster a deeper strategic subtlety on the part of aggressors.⁶⁵⁵

This reversion to indirect methods can be seen in the conduct of every war since 1945, for each bears the mark of restraint, insofar as nuclear powers participated. The case of civil war is even more illustrative of the role strategy fills in the era of vast nuclear arsenals. Civil wars cannot be won by elimination of the entire society. Only by preserving the nation can the competing political aspirants and their forces hope to gain anything by recourse to arms. Thus, in civil war, the use of nuclear weapons will be minimal, while the use of clever strategies will proliferate.

Thus, we disagree with Respondent that the timeless maxims of strategy are useless in the age of Nuclear weapons and may be safely forgotten. They are still of paramount importance to military victory and, therefore, to justice.

THAT POWER IS NOT JUSTICE, BUT RATHER JUSTICE IS POWER

Respondent objects that have contradicted ourselves, as we earlier denied that power was justice, but now we have finished positing a political system so powerful that it will be just. Thus, asks Respondent, have we not proved at long last that power *really is* justice? We reply that we have not contradicted ourselves, but rather have made a most subtle and important point regarding justice. We held that Respondent was wrong in asserting that power was justice. But we did not state how wrong. In point of fact, Respondent got the truth exactly backwards: power is not justice. *Justice is power*. Power does not create justice, rather justice crates power. Political might does not establish justice. Rather, establishing justice crates political might. The most

⁶⁵⁵ Liddell-Hart, *Strategy*, Preface.

just system will become, by consequence of itself, the most powerful state. Mao believed that justice came from the barrel of a gun. We have now shown that the opposite is actually the truth: the barrel of a gun comes from justice.⁶⁵⁶

⁶⁵⁶ Mao Zedong, *Problems of War and Strategy*. Selected Works, vol. 2 (1965).

PART V: DISPOSITION OF THE CASE:

In view of the foregoing, we hereby reverse the decision of the United States Supreme Court and remand for proceedings consistent with this opinion, with all costs payable by the Respondent. Respondent shall also reimburse petitioners for the percentage of Petitioner's taxes which Respondent spent in connection with all stages and aspects of this case.

.....

Such was the abbreviated text of our opinion and final judgment regarding the 'Matter of Polyneices.' The case was a family affair, but became much more. It became a national matter and a matter for all time. It was a case of two brothers who murdered each other in a contest over national leadership. The brothers' sister, obeying the laws of natural decency, buried her traitorous brother anyhow, and her uncle had her condemned to death for it.

She appealed her death sentence and lost under American law. She turned to us, her final court of appeals, and begged us to review and reverse the injustice she had suffered. Her lawsuit was against her country and its legal system, a system which could make a law requiring that she leave her brother's corpse to rot, a system which could condemn her to death for doing that which natural decency required, a system which could uphold her death sentence at every stage and turn, a system whose legal doctrines easily sanction such a result. We reviewed this case as requested by both her and her country and found the United States guilty of injustice. Accordingly, we reversed the judgment of the United States. Such was our disposal of the 'Matter of Polyneices.'

Respondent, United States of America, did not appeal this judgment, but immediately filed a separate action against this court, alleging injustice on the following grounds:

- 1) That this court wrongfully exercised distributive justice, that it acted in a flagrantly legislative manner throughout *In Re The Matter of Polyneices*, in violation of the separation of powers;
- 2) That this court prohibits by its own arguments the very type of behavior in which it engaged throughout the case; and
- 3) That reasons 1 and 2 above establish that this court is nothing but a *Kangaroo Court*.

In defense of the above claims, this court responded as follows:

FREQUENT QUESTIONS

ABOUT THE BOOK

Q.: Who is the intended audience of the Book?

A: It is for the philosophically, politically or intellectually curious. It is for jurisprudence fans, political scientists, politicians, lawyers, judges, sociologists, and certainly, philosophers. It is for the patient scholar. It is for those who have the eyes to see, the ears to hear, and the minds to contemplate. It is especially for those of us who 'know.' The book will be more popular in several hundred years, among peoples more concerned with the issues of justice than the current generation. The book is a seed that will bloom when the time is right. It will most often be read by readers in other nations and in other languages, and in ages far distant from our own. It is not for those who lack the patience to read it, nor for those who are reckless or hasty with ideas and generalizations; above all, it is not for the illogical or emotional. It has been designed to be insufferable to such people, and thus by its very structure, it filters them out.

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Q: Why was the book originally entitled *The Kangaroo Court*?

A: The title encapsulated the message of the book in shortest possible phrase. It at once posed the central question of the book and supplied the answer. Only with this title could one actually read the title and not need to read the book. What is a Kangaroo Court? A court which is unjust. Are any courts just? What is justice, anyhow? A Kangaroo Court is impossible if there is no such thing as justice, thus the title answers the question it raises: there is such a thing as justice, and this justice may be entirely divorced from legality and political forms. Thus, the title immediately makes two points, first that there is an absolute justice, and second, that justice is not the rule of the strongest or mere legality. Third, the title invites a critical question, namely, which court is being called a kangaroo court? Is it the United States Supreme Court? Or is it the court which speaks in the book? The court in the book often acts very unlike a court. On the other hand, much criticism is leveled at the United States Supreme Court. This is a constant tension in the book which is designed to keep the question as to true justice alive and inflamed throughout the work. The title invites the reader to take up this question in the most serious manner possible. Also, the aboriginal etymology of the word Kangaroo restates the central question of the book. Look it up. The title can also be seen as forming an example of harmonic constitutional analysis, being a blend of oligarchy and judicial power, a combination of functional and per-capita separations of power. So, those who think the former title was trite, self-deprecating or too whimsical have not used their minds enough, they must dig deeper.

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Q: Why is the book written in the style of a legal opinion?

A: The format accomplishes two important objectives. First, it provides a dramatic vehicle which restates the points made in the text. The main themes of the book are depicted figuratively by the setting, characters, and organization of the case. Second, it provides a dialectical vehicle through which each issue can be raised, tested, and resolved, in favor of one party, the other party, or in a third way, as the court pleases. The parties to the case represent schools of political thought which can thus be vindicated, condemned or abandoned. The characters intermittently become the mouthpieces of various groups from sundry eras, thus the similarity, or even incompatibility, between such theories can be highlighted. The format also adds the human element back into the treatise, and this human realm is the natural environment for political questions. The antagonism and competition inherent in the legal case format also reflects a point made throughout the book, namely that competition permeates all aspects of life and justice.

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Q: Why is this 'judicial opinion' unlike real judicial opinions? Why does the court allow the parties to interrupt its opinion with various objections, as would never happen in a real court opinion, and why does the court stray into highly philosophical and esoteric discussions, since no real court would do such? Courts don't really write opinions like this. Isn't this just a sham?

A: The question seems to be, isn't this just a Kangaroo Court? Is the court behaving as a court should? Is the court obeying its own descriptions of the proper boundaries of judicial power? Isn't it violating its own pronouncements even as it enunciates them? To shallow thinkers, the imperfections of the opinion will merely seem to be the mistakes of an author who doesn't really know how courts act or write. Deeper thinkers will understand that these procedural defects are intentional devices designed to elicit questions and highlight the main points of the book, to revive and refine the central question as to what is the ideal system of justice. For those who dig deep, they will find in these defects an aquifer of ideas restating the issues which the prose maps out in more pedantic terms.

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Q: Why is the language so archaic and stilted? Isn't this an example of a writer who can't write?

A: Like every aspect of the book, the vernacular was chosen with the utmost care. It is intended to make several points. First, it emphasizes the antiquity of the basic ideas upon which the theory of the book rests. Second, it implies that truth is timeless and not a mere artifact of contemporary times. Third, the language chosen is that of an era which most sympathetic to the book's message. The era in which the ideas of capitalism, rationalism, utilitarianism, constitutionalism, and political liberty flourished used this permutation of the English language. It was the era of the founding of the United States and the decades thereafter. This grammar supplies a constant, blatant hint as to the final outcome of each issue and the overall case itself. Within one or two pages, the language itself betrays all the likely points to be made in the rest of the book. A philologist or historian might grasp this immediately, and thus, the language is yet another manner of making and restating the central points of the book.

Some may say the language is old, but it is actually young, younger than current English, and it retains a certain candor and power lost to the language as it grew old, in the twenty-first century.

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Q: Won't the sales and popularity of the book suffer because of this archaic language?

A: Readability will suffer only among English speakers, and only among those of the current and subsequent few generations. Translations of the book into other languages will render the book modern in terms of the foreign languages, unless the translator intentionally antiquates the translation in order to simulate the effect I have sought. Moreover, no English speaker who reads this book in three hundred years will much care if the English is Nineteenth-century or Twentieth century dialect. They will both seem equally awkward, much as nobody cares today whether the older Latin of Cicero is awkward compared to the newer of Marcus Aurelius. To most, they are both just ancient Latin, and one day this will be just ancient English. Essentially, this question of popularity is strictly an issue for twenty-first century average American readers. They will perhaps be confused, which is acceptable, as they are not the primary audience. The true audience will have the intellectual stamina and sharpness to look into the language and extract the messages which it contains. The book will make less money, but there is money enough already; the book is a gift to mankind. Or perhaps a scolding. But it is not for money.

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Q: Why does the book spend so much time right at the beginning with such seemingly unimportant and unrelated subjects as the nature of language and the absolute existence of things? This seems so boring and off the subject.

A: The resolution of these issues makes all the actual political questions fall neatly into place. Again, the outcome of the case is a foregone conclusion once the idea of relativism is refuted. These issues are the foundation to thought itself, and they solve more problems down the line than most people think. Once they are put out of the way, there is far less to argue about later. Many issues obtain a clearer focus, and several are eliminated altogether. Also, these issues are classically the first which need to be understood before any further thought can be undertaken. Rumor has it that the Plato's Academy bore the sign 'none shall enter but that have studied Geometry first.' Likewise, the logical works of Aristotle are traditionally placed before his other writings. They are always studied first, because they are the tools of thought itself. It may be boring, but only to those who lack the stamina and desire to get to the bottom of the subject at hand. It may seem irrelevant, but only to the beginner. Also, these passages act as a crucial filter preventing unwanted readers from accessing the ideas of the book. Zealots, illogical, bigoted, and over-emotional people will put the book down rather than wade through such abstract and exacting sections. This is a great benefit, for once written, a book never stops speaking. The only defense against being twisted and mis-used by idiots is to write in such a way that idiots never read the book. If these sections bothered you, this is a message. If you didn't make it through these sections, it is a stronger message; this political theory isn't meant for you. You are not welcome.

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Q: Why doesn't the book address women's issues and women's rights?

A: The *entire book is about women's rights*. The petitioner is a woman, with whom and on whose behalf the court devises its entire political theory. It is with her concerns that the court is exclusively interested. The better question is what happened to male issues, and the implied answer is that these would be answered no differently than for women, for neither the court, nor petitioner, nor respondent suggests that there is or should be a different justice for different sexes. Women's rights turn out to be human rights.

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Q: The petitioner does not discuss human rights, but merely her own. How, then, can she represent all people?

A: Justice is depicted in classical art as Themis, a woman blindfolded and holding a scale. The statue of liberty in New York is a woman holding aloft a great torch. Here, justice is depicted as a girl who loved her brother. Liberty is a lady in many contexts. Justice for all comes from justice for the minority and the individual, especially the vulnerable, powerless, and oppressed. She is such a person. In this sense, the work is about the most powerful nation on earth trying to destroy lady justice.

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Q: Why is the book unfinished? It ends in a colon.

A: The book is finished. The subject is unfinished.

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Q: Why does Respondent argue essentially against himself when discussing Plato's objection to war preparation? Is this a mistake by the author?

A: Nothing is accidental or a mistake. Find the hidden meaning in everything. The Respondent is learning, and has been learning throughout the case. Respondent is growing more, approaching subjects in more philosophical ways than before, willing to genuinely believe in some of the philosophical points it earlier denied so strenuously. It is more a philosopher now, whereas it was willing to say anything to win earlier. Respondent is more interested in truth here than its own innocence. It is seeking justice, perhaps for the first time in the case, not merely victory.

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Q: The book speaks of the writings of Socrates, but he never wrote anything. Doesn't this mean the author made a mistake?

A: Nothing is a mistake. Find the secret meaning everywhere. Who said this and why? Respondent said it. It shows that they are at once beginning to be interested and persuaded by ancient philosophy, and that they are still rank amateurs at it, whereas they totally disdained philosophy earlier.

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Q: Why are some quotations actually widely separated parts of books, grafted together so as to appear to be a connected quote from the author? This takes words so

out of context that one cannot trust them, and readers must have constant recourse to the original texts quoted in order to get an exact quotation.

A: That is why the quotes are often built that way. The more forcefully to make a point, and the more forcefully to constrain careful thinkers to refer the originals and read them in their entirety. There is also the constant question of the legitimacy of the court lingering in the background. Is it a Kangaroo Court? Does it know what it is talking about?

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Q: Why is there a grammatical or usage mistake in Respondent's request for leniency in the section regarding Harrington's separation of legislative tasks? Did the author make a mistake?

A: Nothing is an accident. The Respondent shows their lack of knowledge and perhaps even sincerity by calling Aristotle a 'theory' instead of a person. But their plea, by mentioning Aristotle at all, shows a growing willingness to accept and condone ancient political theory, demonstrating the philosophical growth of Respondent thus far in the case. Earlier, they utterly despised Aristotle. Why is their growth important? It illustrates the point that the exercise engaged in by the Court is not idle but productive of actual reform and improvement in government. It is the principal punishment meted out to Respondent, namely to learn, which is the appropriate punishment for all ignorance.

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Q: Why does the court take a whole page to discuss an aspect of Petitioner's claim it deems irrelevant? The court does this by comparing Aristotle's equal protection with Marx's class-based jurisprudence, concluding that America's jurisprudence is not what Marx termed a jurisprudence for the bourgeoisie class.

A: If it is in the book, then it is not irrelevant, regardless of what the court says. The court is ringing a bell and then piously claiming to have un-rung it, which is impossible. The court is, in this way, able to make a point which is not at issue in the case: several lessons are thereby made at once. 1. This may be a Kangaroo court. 2. It may be playing fast and loose with justice in this instance. 3. Marxism ought not to be used as a bogeyman to scare people into a conclusion, as in an *argumentum ad communism*, the argument that something is wrong simply because somehow similar to communism. 4. Marx was wrong that American jurisprudence is class-based, and so are the critical legal studies theorists.

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Q: Why does the author believe naively in myths like Romulus and Remus' founding of Rome? He writes like these are true, although nobody honestly believes in them anymore. Is he stupid?

A: Everything is there for a reason. Nothing is accidental. Did the author claim the myth was true or does the court, as a fictitious character do so? Why is a fictitious court willing to lend credence to a fictitious founding of Rome? Are they worried about undermining their own source of existence? Are they interested in the archeological truth, or scientific truth, or are they interested in the truth of the principle they

are illustrating and willing therefore to use whatever illustration is apt and productive of knowledge? Why does the veracity of the myth not matter to the court? Why is it not challenged by Respondent? What is the author saying by leaving it unchallenged?

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Q: The Author cites the Case *United States v. Dred Scott*. Everyone knows this was not the name of the case. It was *Dred Scott v. Sandford*. Why does the author make this mistake or lie?

A: The *Dred Scott* decision demonstrates by ironic reversal the point the court is making. Dred Scott was deemed not a person within the meaning of the constitution, and hence had no standing in court. Likewise, the court teases, the United States is not a 'government' within the meaning of the constitution and hence has no standing in court. It is a sharp ridicule of the Respondent since it reminds them of their former toleration and protection of slavery, but it is merely a jest since the court almost certainly does not condone the Dred Scott outcome, and would not seriously analogize with it. As for the change of the name Sandford to United States, this makes the point that a prosecutorial party to a case may be misstated, and it should upset those who realize it. If this upset you, then so should the misuse of the name United States. And if you did not see the deeper meaning of the misstatement, you must read more carefully before getting upset or assuming the author is wrong.

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Q: What is the message implicit in Petitioner's penalty requiring her to suggest a name for the Federal Government? Why does the Government have to pay for this?

A: This penalty touches on four ideas, first free speech, second, the non-relativity of names, third, the nature of punishment, and fourth, the irony of name-calling. The people must never be made to pay for their freedom of speech or rights of petition. Penalties which require speech or petition are no exception. Naming is absolute; the petitioner must carve reality at the joints, so to speak, in order to Name the American Federal Government. This is a highly reflective exercise. It requires her to understand America first. Thus, the punishment is to learn, as Plato suggests. Also, on a somewhat more superficial level, there is the irony regarding name-calling. Is she going to name it or call it names? What does it deserve to be called, considering its treatment of her? Will she call it the Kangaroo State? What is she justified in calling it?

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Q: Why does the author use the obtuse expression 'the dawn of the twenty-first century casts its rosy fingers over yet another millennium...'? This seems like a desperate and bad attempt to be poetic.

A: This expression is from Homer, and Homeric scholars will greet it like an old friend. It remakes the point in the sentence: three thousand years have not changed the fact that there is no global government. The period of time demarcated by the rosy fingers expression is three-thousand years, insofar as Homer writes of events which took place just over one thousand B.C., give or take a hundred years or two. The phrase is a reward to those who are well read. If you thought this was mere poetic license, you are not as well read as you could be, nor are you as good a reader as you could be.

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Q: Why does the court blast the U.N. for under-representing large nations and then cite as an example of Security Council injustice the power of the most populous nation on Earth, China?

A: It is an irony the court intentionally presents. This is the ultimate example of under-representing people: the most populous nation on Earth is a tyranny at present, or an oligarchy at least, and the voice of its people has no role in U.N. policy whatsoever.

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Q: The court sometimes claims that it mentioned something earlier, like its citation of Sydney's 'the best nation is that which best prepares for war', and Machiavelli's 'good laws are useless apart from good arms.' In fact, these do not occur earlier in the text. Is this a mistake?

A: Nothing is a mistake. Find the meaning in everything. This suggests that the court may be familiar with Sydney because he appealed to it himself when he was sentenced to death, and Machiavelli, when he was jailed. Or perhaps the court has ruled on such issues before.

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Q: When discussing whether the best state is that which best prepares for war, why does respondent withdraw its own objection and cite Craig in support of what it formerly denied?

A: Respondent is learning, and no longer looks to winning the case at all costs, but rather looks to the truth. They are still unable to think entirely for themselves, however, and hence cite Craig rather than doing their own thinking.

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Q: The court fails to address religion in any meaningful way, though they almost launch into a theological investigation and are stopped by the litigants from proceeding. Does this mean the author is an atheist?

A: This failure of the court to address theology symbolizes the separation between church and state; this is a book about an ideal government, and ideal governments do not espouse religious doctrine. Therefore, the court does not broach the subject.

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Q: When discussing the question "what is the good life", the court analogizes life to 'knife'. This seems like a petty rhyme and is annoying. Why does the author do this?

A: It is a good rhyme, for man is partly a being that intellectually cuts. His mind makes distinctions. This is his way. But he also mentally combines, or blends. To emphasize this duality of humanity, the court uses another example, the loom. A loom pairs or recombines things. Thus, the meaning of life is that man parts and pairs. This is actually the answer to the meaning of life, even though the court professes to pass over the question altogether in the next section. Taken as a whole, the answer to the

meaning of life is given merely by asking the question, for *asking the question is the meaning* of life. The court cannot pass over this topic even if it tries, for it has already demonstrated the meaning of life by asking the question ‘what is justice?’ Like Sun Tsu, the court has won the battle before it arrives at the battlefield. It need not even fight the battle, and this is why the court passes over the question.

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Q: Why does the author’s literary voice change from time to time? Does this mean he is unstable or amateur?

A: The voice changes in order to emphasize various points. For example, when discussing Gibbon’s characterization of the Christian constitution, the author’s voice slips into that of Gibbon. This is an unmistakable hint that the author agrees with Gibbon.

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Q: Why is it relevant to point out that the Harmonic constitution reunites Aristotle’s twofold division of social justice into *political* and *particular* justice? This seems trivial.

A: This is pointed out not only because of the important implications the unity has for Aristotelian scholars, but also because the union itself solves the case of Antigone, which underlies the book, bringing together the lawful and the right, or just.

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Q: There are so many instances where the author adopts definitions and makes points which are contradicted by the vast majority of people’s opinions. For instance, democracy is defined as the rule of all the people, but this is not what the vast majority mean by democracy. Why does the author not accede to the common meanings and argue about points currently being debated instead of being contrary and off the subject of contemporary inquiry?

A: Contemporary majority opinion is wrong, and contemporary political theory is largely off the subject. The author does not give a damn about the opinion of the masses, and even less the masses of specialists. This point is manifest in the use of the courtroom as a setting for the work. The court is the realm of the aristocratic rule of the few; it is not a democratic forum where the majority opinion holds sway. This point is reinforced throughout the work, especially in the sections regarding the nature of opinions compared to truth and the shortcomings of democracy. The opinion of the masses is irrelevant to truth, and the gravamen of public political discussion is the product of myopic specialists without a knowledge of the whole. Both are not worth respecting if one intends to discover and relate the truth regarding political philosophy.

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Q: Why does the book misquote itself? Early in the book, the genius of Republics is said to revolve around the fact that that “*without both consent and wisdom*, there can be no enduring legitimate sovereignty in any political context.” Later, however, the book quotes this earlier passage, but gets it backwards, “*without both wisdom and consent,...*” Why must we readers endure such sloppiness?

A: The two ingredients of the quote are reversed, or flipped, in order to emphasize the fact that the same point has been derived from the opposite reasonings: in the discussion of the Republic, the point was made on the material plane of practical institutions, whereas in the later section it is derived from the metaphysical plane of theoretical legitimacy. As the physical and metaphysical proofs are opposite in some respect, but yet say the same thing, the quote needed to be made opposite in some respect and yet say the same thing. Thus, A and B is flipped and becomes B and A. It is not a mistaken quote. Do you still think its sloppy?

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Q: Why does the author choose such mundane examples, (frustratingly and insultingly plain examples) as, “An individual will know far better than anyone else what value he or she personally attaches to a particular knife, these eyeglasses, or that lamp.” Why put adults through such an insulting thing as to read about knives, glasses and lamps?

A: The knife cuts reality at the joints. Eyeglasses let one ‘see’ in the metaphorical sense, so long as there is light, which is the lamp. This sentence means, each individual knows what value he attaches to *wisdom*. The whole section is about wisdom, so the examples chosen reflect that topic and represent the three things necessary to wisdom: the talent, the mind, and the truth.

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Q: The author states that one “is” one’s effects, and then equates this with property. What is the point in teasing the readers with the multiple meanings of the word effect?

A: One’s identity is intrinsically rooted in both meanings of the word effect, namely the consequential results of action, and second, property. Therefore, the word game is intended not to confuse, but rather underscore the relation between property, control, and identity.

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Q: Why does the court state that it will exercise some leniency on the Respondent because the doctrine of governmental immunity has been adopted? After all, the respondent never asked for or suggested such.

A: It is an issue raised by the court and the leniency is a sui-sponte gift. This underscores the role of the court as a seeker of justice, not merely a technocratic handler of pleadings. But it also raises troublesome questions regarding standing and the adversarial model of adjudication, which again hints at the possibility that this may be a kangaroo court.

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Q: Did the Court attack or defend Christianity in the section regarding funerary ceremonies?

A: The court defended it by attacking it; the author attacked it by defending it. It was a scythian defense, which potentially opens the court up to a charge of injustice in light of its pronouncements regarding the morality of methods of waging war.

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Q: The court states that a global government will arise only from a global threat. The book, on the other hand, seems clearly to be pressing for a global government based on its federal harmonic constitution. Does this not support an inference that the book is seeking to create a global threat?

A: No, unless the reader understands the ideas to be a threat. If the ideal of the federal harmonic constitution is so threatening that it impels states to confederate, they will best do so according to that very ideal. But this is no the type of threat to which the court refers. Moreover, the court need not create such a threat, since it believes the crisis is latent in the human condition and will arise naturally with time. It does not seek to create the threat, nor does it long for one. It merely establishes a manner of dealing successfully with it when it materializes.

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Q: The book proposes the age-old question, 'what is justice.' But how, at last, does it answer that question?

A: The question is 'what is justice.' The book's answer is: *Right. That's justice.* This is because the question *is a system*, it implies the need to construct a mechanism, a constitution, for sifting and dealing with the issues of human political life. Constitutional justice is a system which thinks about justice, one which takes into account the various opinions regarding justice, according to the appropriate weight of each. It is a system of who rules, how they rule, and where. The harmonic constitution is the physical embodiment of a nation correctly thinking about justice. That is why the answer to the question 'what is justice' is '*Indeed.*'

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Q: In Sophocles' story, Antigone committed suicide. She did not appeal her predicament to anyone. How, then, is the book analogous to Antigone's situation, since in it, Antigone appeals, wins, and as a result does not die?

A: There are several ways to look at this. First, Antigone appealed her death sentence to god in Sophocles' play, to a higher authority, truth itself. In this sense, her appeal in the Kangaroo Court is similar. Second, Antigone probably is dead in the Kangaroo Court. The Book is a present tense recount of a past case. Third, Antigone was rendered immortal by Sophocles' play, so in at least one sense she did not lose or die in his play. Fifth, Sophocles' play and *America On Trial* are works of imaginary fiction, about imaginary characters, which not being real, by definition cannot either live or die, regardless of what is done with them on paper. There are many other ways besides these to show the unity of meaning behind the apparent death on the one hand and the continued life on the other.

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Q: If the harmonic constitution can be called cubic, why not do so instead of using the strange term harmonic?

A: It calls forth the idea more precisely than would references to cubic, as this latter term is one of spatial extension whereas harmonic is one of interrelationship. We do not avoid the term cubic merely because the six basic constitutions, the three pure and three corrupt, equal the number six, the number of man, and the number of 'the beast' according to the Christians. Were we to call the constitution cubic, six

parts made into a cube, 6^3 , this would be 666, and subject to unwarranted criticism from ecclesiastical circles. But this is actually immaterial.

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Q: Why use the device of dramatic depiction in an era of free speech? Ancients often used esoteric writings and dramatic settings to conceal dangerous points of view from censors yet permit their true audience to receive their message. We have no censors in our society today. Why not, then, just write a treatise, stating directly what is here hidden and woven into the riddles and folds of a fictitious court case?

A: Two reasons. First, as said above, these ideas are not for all audiences. The dramatic devices provide a filter which shuts out readers who are not ready for these ideas. Second, the dramatic and esoteric elements will help the work to survive a future age of censorship and to penetrate regions where censorship yet remains. It is in such times and conditions that the message of this work is most needed. They need the esoteric element more than free peoples need naked clarity. The greater good is served in this way. Moreover, the use of esoteric elements could imply that an age of censorship indeed exists in some form already, or that it might be impending. It also exercises and empowers the mind, augmenting national power and the efficacy of the democratic element of whatever peoples read this book.

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Q: What is the purpose of the strange jurisdictional test, requiring consent to five logical propositions?

A: The court cannot discuss questions of justice without the consent of the parties to the principles of logic. The court is an organ of truth-finding. For this reason, logic is the sole foundation of the court's jurisdiction. It is the requirement for all truth, and hence, the requirement for justice. Legend recites that Plato's Academy bore an entrance plaque that read, "Let no one unversed in Geometry come under my roof." This is that threshold. This is the door beyond which justice may be found. Moreover, the jurisdiction of the court is twofold, requiring consent, and logic, i.e. rationality and wisdom. This mirrors the twin pillars of ancient and modern political legitimacy, the former based on wisdom, the latter, on consent. As the harmonic constitution unites these two forms of legitimacy, the jurisdictional test of the Court symbolizes this unity, a unity requisite for justice. There must be both consent and wisdom.

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Q: The Court in the book often seems guilty of breaching the rules it advocates. It would especially seem to be usurping some kind of legislative power. What does this mean or is it a mistake the author makes?

A: The incongruity between the courts admonitions, teachings and doings highlights several key points made in the book. First, it reiterates the basic lesson of human nature, that humans are prone to error and corruption, even the wisest. Second, it suggests a lack of proper separation of powers operating on the court. It should raise the question as to why the court is able to act this way. Is there no Kangaroo Legislature and Executive somewhere? No offsetting power to check their insolence? The crucial role of the separation of powers is thereby underlined by the court's loose conduct. Finally, as persons, the court's behavior dramatizes the difference between the rule of law and that of men.

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Q: The court asserts that “the definition of the whole can be manipulated so as to clothe adjudications in legislative costume, but such is trickery, and the manipulative parties will not be so easily able to redefine the past as to make it appear to be the future, or describe the future so as to deceive people into thinking it the past.” But the court seems to be very legislative throughout the case. How can this contradiction be?

A: The court engages in just such trickery. It redefines the past to make it appear to be the future. This is also hinted at by the tense of grammar used to cite and quote thinkers of the past, and also hinted at in the setting of the case, a present publication of a past matter, the past matter being written in present tense, as if a real-time narrative rather than a report or recapitulation. But this may not be trickery after all, since jumbling the time frame does not eliminate temporal existence, but rather stretches it out, making the point that the ideas are timeless, that principles of justice are timeless, and the court is citing truth, not making law. Thus, the court is not engaging in trickery after all, but rather reminding cleverly that law is not justice, power is not justice, that truth is not opinion, that truth is tense-less.

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Q: What is the hidden symbolism in the expression used early in the book, “The search [for justice] would be quick indeed if one were able to opine that justice was a purple sheet and be right by virtue of the fact that it is a purple sheet *for him*.”

A: This is a hint that justice requires freedom, liberty, and a retreat from monarchy and the rule of man. Purple is the color that conveys the hint. Purple is the traditional color of royalty. Kings, Consuls, and Emperors wore purple, the expensive Phoenician purple. In Rome, ‘the purple’ meant the crown, or the office of Emperor. Plato makes a similar symbolic point in the Republic when discussing dying fabrics such that the color stays fast, the purple stays in. There it is a message about sovereignty. Here it is about tyranny.

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Q: Why does the author choose Greek drama as the underlying factual structure of the case? Didn’t Plato criticize the poets and playwrights? Why does the author pay them such a compliment by using Antigone? Why not a Platonic story?

A: The form of Sophocles’ dramas underscores the separation of powers theme in the book. In Sophocles’ plays, there is a protagonist, he is the monarchic element; then there are the lesser characters, they are the aristocratic element: and finally there is the chorus, the democratic element. The Greek drama thus analogizes the mixed constitution and is therefore the proper format to convey a political theory highlighting the separation of powers. It also highlights the fractal essence of ideal politics; a political drama built of smaller political dramas. Thus the drama of the court, petitioner, respondent, and amici is made up of the dramas of Antigone of Plato. The Republic and Antigone are like member-states in the fractal federation of the Kangaroo Court. Moreover, they are elucidated with many myths from ancient history. Each one yet a smaller level of the drama fractal. The myth of the Horatii, of Romulus, these are dramas within dramas within a drama. This is why Greek drama had to be the format.

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Q: Isn't there a biological reason for originally naming the Book the *Kangaroo Court*?

A: Yes, the Kangaroo carries her young in a pouch. In this sense, the court is a creative agent nurturing the future of its children. The nurturing court. In the best Platonic sense, it does not truly penalize, but rather it raises, it educates, which is the appropriate penalty for all who have been proven not to know.

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Q: Why does the Author single out Heisenberg for criticism when there are so many other greater scientists?

A: It is not only his uncertainty principle, but the relation between his relativistic science and his idealistic support of Nazism, that the court is criticizing by singling him out. He organized Hitler's atomic bomb project. The court thinks it necessary to highlight in this way the ultimate connection between relativism and political slavery; a Nazi scientist who came up with the uncertainty principle and tried to give Hitler atomic weaponry. The court is even more interested in showing this relativism in the sciences, especially the Nazi sciences. Were goodness relative, Nazism could not be bad, nor could science in the service of Nazism. Singling out Heisenberg accomplishes a second purpose, as well. It shows that science is highly political, not amoral, as the court will go on to discuss. This section thus pre-states the conclusions in the next several chapters. A deep reader will know before reading the next chapters what the court's opinion will and must be regarding the supposedly amoral characterization of the sciences. The section also esoterically resolves in advance many points about democracy, equality, economics and social organization which are made explicitly later in the book. Only criticizing this particular scientist makes all these points on all these levels.

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Q: The book contains politics, philosophy, theoretical physics, fractal geometry, and ancient history. Certainly, there are only a few persons in the world who can understand all this. What is the point in writing a book which only a handful of people in the world can even understand?

A: Such a book is like the Arthurian myth of the sword in the stone. It is not for everyone to draw the sword, only the ones chosen for power: the leaders who have sufficient character and responsibility, those with the requisite wisdom. All others will fail by design. They will avoid the sword, or tug at it in vain from greed or lust for power. Those unworthy persons who dive into this book in order to advance their lust for power will be unable to grasp its message, by design. They will be unable to draw the sword from the stone.

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Q: The book constantly whispers and reminds of Cervantes' Don Quixote. Why and how does it do so?

A: This connection is one of the most prominent and esoteric in the book. First, there is the title. When in prison, Cervantes was subjected to a kangaroo court of fellow prisoners who decided the merit of his book. This is a literary parallel. It is also an explicit intersection between Plato's allegory of the cave and this book's posture in

contemporary society. As was Cervantes', this book will be judged largely by unworthy and incompetent people. This revives the question as to who is the Kangaroo Court. The author is hinting strongly that it may be the readers themselves. Second, there is this book's impossible search for the ideal of justice, exactly Don Quixote's quest, complete with its conservative antiquarianism and near-lunatic suggestions. Third, the book features a star-crossed weakling taking on an impossible goal; Petitioner on death row tries to defeat and restructure the United States of America. Respondent is portrayed as a windmill, a system. Petitioner as the jousting. The court says time and again that justice is a matter of system, and justice is the interplay of the individual and the system, the interplay between the jousting and the windmill. Respondent windmill is a monster, but actually not a monster, rather an intricate and productive machine perhaps in need of repair. But it must be seen as a monster in order for the ideal of justice to become clear and attainable. The court is another Quixote, striving to attain an impossible ideal, a Utopia, and it is itself a dream, just an imaginary court. The author is thus walking reverently in Cervantes' footsteps. They both made a similar literary voyage to the same destination. Finally, there is the format of the book. It is fiction. A dream. Without a guiding dream, we die. This is why the book could not have adequately been written as a treatise or textbook. If it had been, then it would not be a dream. There would be no dream, and the search for justice would be dead. All of this consciously echoes Cervantes.

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Q: The author makes a mistake when he refers to a Confederate Republic of Germany. No such state has ever existed.

A: Really? Didn't it? Consider the argument it makes to the court. Did such a Germany ever exist? Nazi Germany did, but the court perhaps considers them unmentionable. Or is it that the court is hinting that the current German regime shares some attributes with this unmentionable state? After all, the fictitious Germany is an ally of respondent and is interested in racist eugenics like the Nazis. Is it a little of both? Such reasoning should lead the reader to realize that the author shows what gene manipulation could be by showing what present day Germany could be. The author introduces an imaginary contemporary Germany by hinting at what Germany tried to be in the past. By merging the past and present Germanys into a new hybrid, the author has performed by analogy the same kind of gene manipulation at issue, making his point over again by subtle symbolism.

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Q: Why does the author begin each section with the word 'That'? It sounds so archaic.

A: It is because each section is a proposition. Implied before each 'that' is a qualifier, as is 'We are now going to opine that...' But it could be any qualifier, and the author is silent on this. It could be 'It is true that...' or 'It could be argued that...' In this manner the author adheres to the idea expressed in the book that truth is not opinion, and the sections emerge as more intellectually provocative explorations than political sermon.

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Q: Why does the author stoop to making a sex joke in the section on sex as a political subject?

A: The author intends to supply a hidden message that sexual theory is part of constitutional theory, and that where federations are concerned, and families too, size does matter. So ‘enormous size’ jokes are apropos.

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Q: Why does the Author include a petty trivia test at the end of the book? Many of the questions seem rote and unimportant.

A: The test is included to prove a point: not even the author passes this little test. Teachers who use this test, or similar tests, are idiots.

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Q: What is the ridiculous blues music section about and why does the author bother to make such an inane point?

A: The court cannot directly address the issue of black slavery since it is not part of the Petitioner’s claims. But the court raises its ghost, its horrible legacy, in this manner. It is a hint about the past injustice of Respondent’s system, though such is not strictly at issue in the case. The author is also making an important point about blues music. Some readers will see only this surface point. Others will understand the deeper indictment of black slavery in the context of the Court’s analysis of justice.

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Q: Does the court represent the author’s opinion?

A: The book represents the author’s unfinished argument with himself over the issues it addresses. No character represents the author.

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Q: Why is the Petitioner’s real name, Antigone, not used in the book?

A: Safeguarding the popular element requires eliminating undue concentrations of political goodwill in aristocratic family names. What does this suggest about her political activities prior to arrest?

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Q: Why are there so many errors and typos in the book?

A: The author is an individual; there was no editor or peer review. The entire project was the product of one person. The typos thus exemplify the major theme of the book, namely that un-separated powers are inept. There were no checks and balances employed in the effort, and it is therefore filled with typos by design.

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Q: Does Petitioner’s victory mean that the people, the ‘democratic element,’ wins the case?

A: No. Petitioner is not of the people exclusively. She is an aristocrat in that she is part of a powerful circle of those influencing the state. She is part of the monarchic element in that she is of the Executive’s family, and she is part of the people in that she is not part of the government itself. She is a hybrid, a mixture, representing the

elements of the harmonic constitution. The harmonic constitution wins the case, at least at this level.

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Q: Why does the United States not appeal the judgment in this case?

A: The Respondent does not appeal because it would be impossible. There is no appeal beyond logic. This is truly the highest court. Instead, they challenge the court within the framework of logic by bringing a new action against the court based on the court's own ideals.

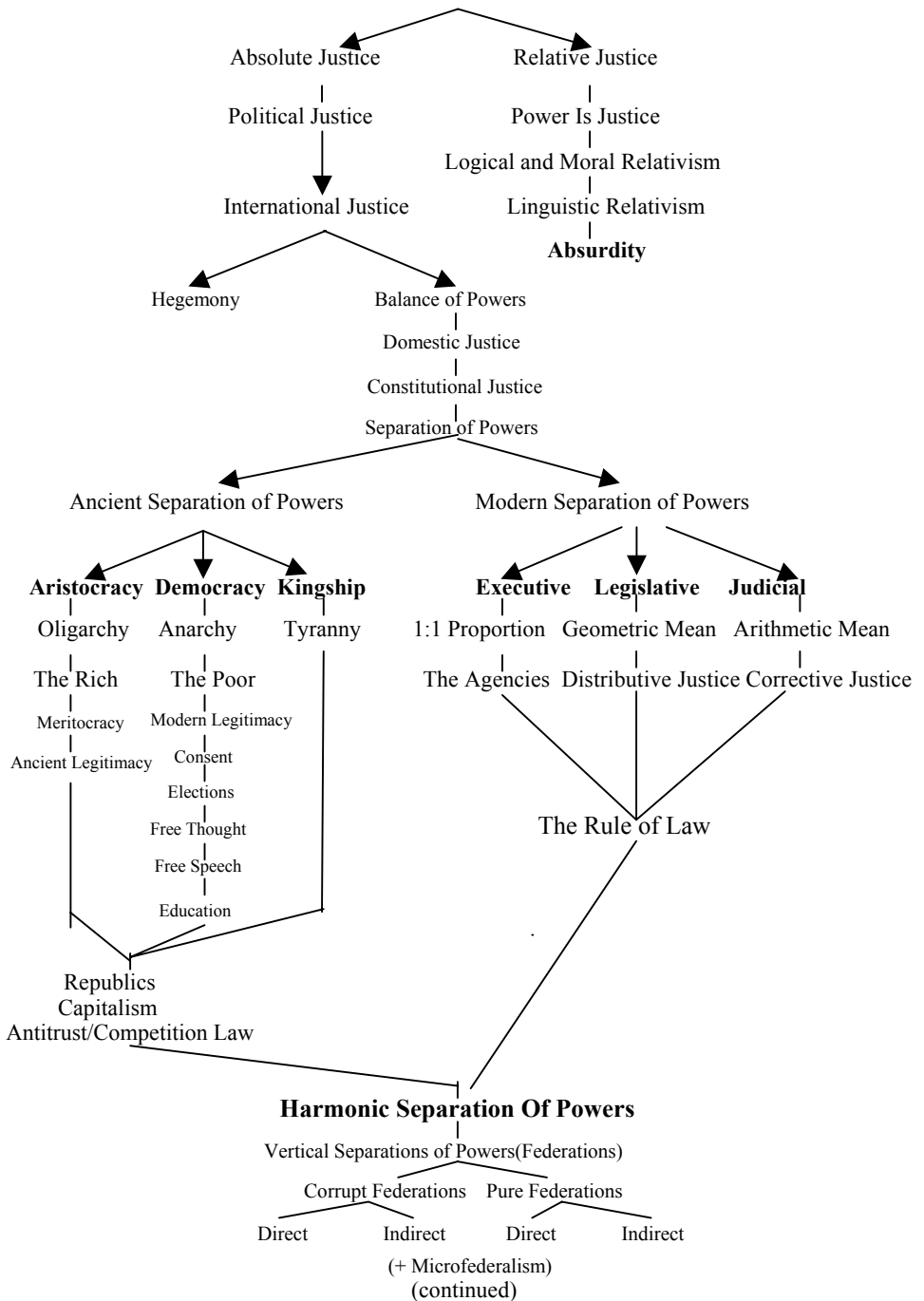
PETTY QUESTIONS FOR CONSIDERATION AND REVIEW

1. What is the moral difference between performing an unlawful act and performing the same act if lawful?
2. In what two ways are adjudication and legislation opposites?
3. Why is universal ontology useless for political questions?
4. What did Herodotus say regarding Sparta's freedom and the rule of law?
5. What is the difference between political parties and interest groups?
6. What doctrines contain the ancient roots of executive power?
7. What is the constitutional dialectic and what are its two phases?
8. What two harmonic constitutional elements does a Bill of Rights enhance?
9. What is the holding of *Zobel v. Williams* and what does fail to say about federations?
10. Explain the distinctions between ancestral and ancient consent.
11. What are the two aspects of optimal consent?
12. What is the paradox of legitimacy?
13. What is the most prevalent form of politico-economic power conversion?
14. What is the economic term for the political idea of the adjudicative power of the people with respect to values?
15. What three examples show that the people rule themselves in legislative, executive, and judicial ways?
16. Where is blended power sometimes best?
17. What is the only good form of enlightened despotism?
18. What is the exception to the rule that re-naming accomplishes no reform?
19. What is the significance of the expression "by us" in the Courts summary of Respondent's motion to transfer case to Tax Court at the beginning of the section?
20. Why isn't all prosecutorial power executive in nature? What part is not and what is its functional characterization?
21. Why is the implied a subset of the potential? And what is the impact of this on implied international consent?
22. What does the case of the *S.S. Lotus* establish?
23. What is the import of the *Paquette Habana* with regard to consent?
24. Was Respondent really wrong about there being a third alternative to hegemony or balance of powers?
25. What did Chrysippus the Stoic posit?
26. Is it ironic that the court denies that it is advancing a utopian theory in the world government section?
27. What is the meaning of the court's disposition of the case? Do they simply let Petitioner live, or do they require that the United States change all the things the court holds to be unjust?
28. Does a Common-law jurisdiction enlarge the democratic or legislative element in an ideal harmonic constitution?
29. Why is it that people usually vote their pocket books?

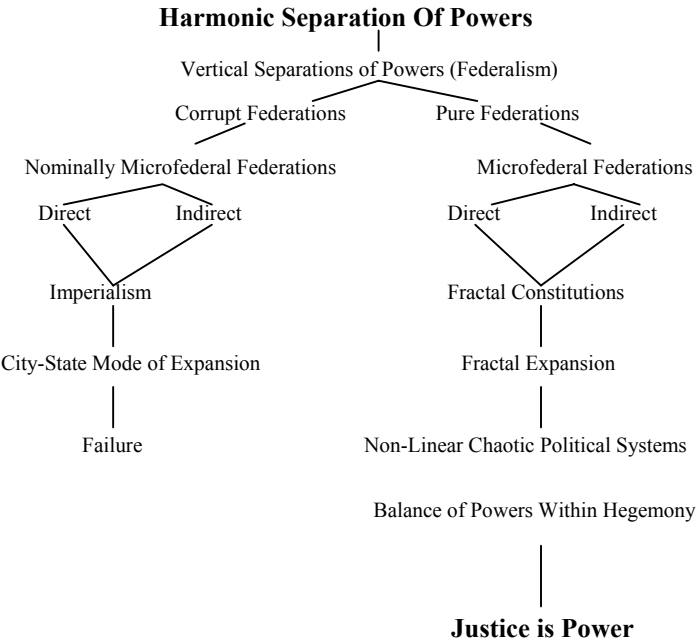
30. What is the natural centripetal result of political competition?
31. What is the Aristotelian term for Due Process?
32. What are Ancestral and Ancient Consent?
33. What form of government is a pure despotism of an individual over himself?
34. What kind of efficiency is long-term economic efficiency?
35. Is it true that if the harmonic constitution were spherical, its democratic element would be the nucleus?
36. Must a federation have a democratic element?
37. Which Roman Emperor directly purchased the throne from the Praetorian guard?
38. Explain the allegory of the gun and its message.
39. In what way is Protagoras' statement 'man is the measure of all things' a political system? What system does it equate to?
40. Which general commanded the Athenians at Marathon?
41. Who engineered Athens' naval strategy?

CONCEPTUAL OUTLINE

Justice



(continued from above)



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